RECORD, CASE No. 14,130.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 764.

JOSIAH BARNETT, AS ASSIGNEE, APPELLANT,

vs.

PATRICK H. KINNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED SEPTEMBER 3, 1892.

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1 In District Court, 2nd Judicial District, Territory of Idaho, County of Alturas.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant. } Complaint.

Plaintiff complains and alleges—

I.

That on the 10th day of December, 1887, at Hailey, Idaho, plaintiff was the owner of and entitled to the possession of the following goods and chattels, to wit: 2 boxes of clothing, 11 cases clothing, 15 cases rubber shoes & boots, 2 cases valises, 5 cases hats, 1 case shirts, 2 cases umbrellas, 1 case notions, 1 trunk clothing, 2 cases blankets, 3 cases furnishing goods, 4 cases blankets.

II.

That the defendant, on the 10th day of Dec., 1887, at Hailey, Idaho, without the plaintiff's consent and wrongfully, took said goods & chattels from the possession of plaintiff.

III.

That before the commencement of this action and on the 12th day of December, 1887, plaintiff demanded of defendant possession of said goods and chattels.

2 IV.

That plaintiff then was & now is entitled to the possession of said goods and chattels.

V.

That said defendant still unlawfully with-olds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of five thousand dollars, the value thereof, and to the further damage for the detention of the same in the sum of five hundred dollars.

VI.

Wherefore plaintiff demands judgment against defendant—

1st. For the recovery — possession of said goods and chattels or for the sum of five thousand dollars, the value thereof (in case delivery cannot be had).

2nd. For five hundred dollars damages and cost of suit.

KINGSBURY & McGOWAN,
Attorneys for Plaintiffs.

TERRITORY OF IDAHO, } ss:
County of Alturas, }

Selden B. Kingsbury, being duly sworn, says: I am att'y for plaintiff in the above-entitled action, & make this affidavit for plaintiff because plaintiff is out of said Alturas county, where his
3 attorneys reside. I have read above complaint & know the contents thereof, and that same is true of my own knowledge except as to matters therein stated on information & belief, & as to those matters I believe it to be true.

S. B. KINGSBURY.

Subscribed & sworn to before me this 12th day of December, A. D. 1887.

A. L. RICHARDSON, *Clerk,*
By E. E. RICHARDS, *Deputy.*

Endorsed: District court, Alturas county. Josiah Barnett *vs.* P. H. Kinney. Complaint. Filed Dec. 12, 1887. A. L. Richardson, clerk, by E. E. Richards, deputy. Kingsbury & McGowan, att'ys for plaintiff.

4 In District Court, Second Judicial District of the Territory of Idaho in & for Alturas County.

JOSIAH BARNETT, Pl'ff,
vs.
P. H. KINNEY, Def't.

Comes now the defendant and demurs to the complaint filed herein, and for cause of demurrer alleges—

I.

That said complaint does not state facts sufficient to constitute a cause of action.

ANGEL & SULLIVAN,
Att'ys for Def't.

Endorsed: In district court, Alturas county, Territory of Idaho. Josiah Barnett, pl'ff, *vs.* P. H. Kinney, def't. Demurrer. Filed Jan. 6, 1888. A. L. Richardson, clerk, by E. E. Richards, deputy. Angel & Sullivan, att'ys for def't.

5 In the District Court of the Second Judicial District of the Territory of Idaha in and for Alturas County.

JOSIAH BARNETT, Pl'ff,
vs.
P. H. KINNEY, Def't.

Comes now the defendant and, for answer to the complaint herein, denies each and every allegation contained therein except such as are hereinafter admitted:

I.

Denies that on the 10th day of December, 1887, or at any other time the plaintiff was the owner of or entitled to the possession of the goods and chattels described in said complaint or any part thereof.

II.

Defendant admits that he took possession of said goods & chattels, but denies that he wrongfully took said goods or chattels from the possession of the plaintiff.

III..

The defendant avers the facts to be that as sheriff of Alturas county,
Territory of Idaho, a writ of attachment was placed in his
6 hands for service against the goods & chattels of one M. H.
Lipman in a certain suit brought by the St. Paul Knitting Works, a corporation, against the said M. H. Lipman in the district court of the 2nd judicial district of the Territory of Idaho in & for Alturas county, whereby this defendant was commanded to attach sufficient of the property of said M. H. Lipman to satisfy the amount named in said writ, with interest and cost, and thereupon, under and by virtue of said writ, the defendant levied upon the goods & chattels named in said writ as the goods & chattels of said Lipman.

That defendant held said goods & chattels as sheriff of Alturas county under and by virtue of said writ and not otherwise.

That said goods and chattels were at the time of the levy of said attachment the property of said M. H. Lipman, as defendant is informed and verily believes.

IV.

Defendant denies that the plaintiff, on the 12th day of December, 1887, or at any other time, was entitled to the possession of said goods.

V.

Denies that defendant still unlawfully or otherwise holds
7 possession of said goods, but alleges that the plaintiff, by the
process of this court, took all of said goods & chattels from the possession of defendant on the 12th day of Dec., 1887, and that defendant has not had possession thereof since said date.

VI.

Denies that plaintiff has been damaged in the sum of two thousand dollars, the value of said goods, as alleged, or any other sum by reason of defendant's having taken said goods & chattels, or that he has been damaged in the sum of five hundred dollars or any other sum by reason of the detention of said goods.

Wherefore defendant demands judgment against the plaintiff for the return of said goods or, in case return cannot be had, for the

value thereof, which value is alleged to be the sum of three thousand dollars, and for his cost in this suit.

ANGEL & SULLIVAN,
Att'ys for Def't.

TERRITORY OF IDAHO, } ss:
County of Alturas, }

P. H. Kinney, being first duly sworn, on oath says that he is the defendant named in the foregoing answer; that he has heard
8 said answer read and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

P. H. KINNEY.

Subscribed & sworn to before me this 22nd day of Feb., 1888.
E. B. LEMMON,
Probate Judge.

(Endorsed:) Copy of within rec'd Feb. 23, 1888. Left at office. ——— ———, pl'ff's att'y. In district court, Alturas county, Territory of Idado. Josiah Barnett *vs.* P. H. Kinney. Answer. Filed Feb. 23, 1888. A. L. Richardson, clerk, by E. E. Richards, deputy. Angel & Sullivan, att'ys for def't.

9 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant. } Findings.

This cause having been heretofore, on the 3rd & 4th days of June, 1889, submitted to the court for decision upon the complaint of plaintiff and the answer of defendant filed herein and the stipulation of facts made by and between the parties hereto, by and through their respective attorneys, and filed herein, after hearing arguements by the counsel for the respective parties, *and* the court, being fully advised, now finds the following facts:

1st.

That heretofore, to wit, on the 23rd day of November, 1887, one M. H. Lipman was a citizen of the United States and of the Territory of Utah, residing and doing business at Salt Lake City, Utah Territory.

2nd.

10 That on said day the said Lipman was possessed of and was the owner of real and personal property situate in the Territory of Utah and of certain personal property situate in said county of Alturas, in the Territory of Idaho, to wit, of a certain stock of goods and merchandise, consisting of clothing, men's fur-

nishing goods, hats, caps, boots and shoes, dry goods, fixtures, and goods of other descriptions, then being in a certain store-room on the north of the building known as "Merchants' hotel," in the town of Hailey and Territory of Idaho.

3rd.

That on said 23rd day of November, 1887, he, said Lipman, was largely indebted to divers persons, none of whom were then or are now citizens, residents, and inhabitants of Idaho, and that said Lipman was then insolvent. He made, executed, and delivered, under his hand and seal, unto the plaintiff in this action, as his assignee, the deed of assignment in writing, which said deed was then and there duly acknowledged by the said Lipman before one Wm. M. Bradley, a notary public duly authorized, commissioned, and acting then and there under the laws of the said Territory of Utah, to whom he, the said Lipman, was then and there personally
11 known; that he, the said Lipman, then and there executed the said deed freely and voluntarily and for the uses and purposes therein mentioned; that the said notary then and there attached to said deed under his hand and seal of office his certificate of acknowle-gement, stating that he, the said Lipman, was personally known to the said notary to be the person named in and who executed the said deed, and that he acknowledged to him, the said notary, that he, the said Lipman, executed the same freely and voluntarily and for the uses and purposes therein mentioned; that thereupon, on said day, the plaintiff herein in writing accepted the said deed and acknowledged the trust therein created, and that he assumed the execution thereof.

4th.

That by said deed of assignment the said Lipman granted, bargained, sold, conveyed, transferred, assigned, and delivered to the plaintiff all of the property, real and personal, whereever situate, including and particularly specifying the stock of goods hereinbefore mentioned, together with all other property at the time belonging to him, in trust, to take possession of the same, and, by
12 collection and sale for cash, as speedily as might be and out of the proceeds pay—first, the necessary expenses of executing his trust, including reasonable compensation for his services and for the services of his attorneys; second, to pay in full, if the proceeds were sufficient, or *pro rata* if insufficient, his creditors according to certain classes in said deed of assignment mentioned; that by said deed preferences were given and made in favor of certain creditors and against other creditors, all being designated by classes.

5th.

That thereafter, to wit, on the 25th day of November, 1887, the plaintiff herein, as assignee as aforesaid, entered into and took the actual possession of all and singular the stock of goods, fixtures, and personal property hereinbefore mentioned as situate in the town of Hailey, Territory of Idaho; that thereafter, to wit, on the 26th day

of November, 1887, and before the taking of said property by the defendant herein, as hereinafter mentioned, the plaintiff, as assignee aforesaid, filed said deed of assignment for record in the office of the register of deeds for the county of Alturas, Territory aforesaid; that the defendant had actual knowledge and notice in all the premises.

6th.

13 That said deed of assignment was and is valid by the laws of the Territory of Utah.

7th.

That thereafter and on said 26th day of November, 1887, and while the plaintiff herein was in the actual possession of the stock of goods and fixtures hereinbefore mentioned, the defendant, as sheriff of said county of Alturas, Territory of Idaho, under and by virtue of a writ of attachment theretofore issued out of this court in an action wherein St. Paul Knitting Works, a corporation, *were* (was) plaintiff and the said M. H. Lipman was defendant, took — possession of plaintiff the stock of goods and fixtures hereinbefore mentioned.

8th.

That prior to and at the time of the commencement of the action by said corporation on which said writ was issued and of the taking into possession of the stock of goods and fixtures aforesaid by the defendant the said M. H. Lipman was justly indebted to the said corporation in the sum of nineteen hundred and two (1,902) dollars for goods and merchandise theretofore sold and delivered to him by said corporation at his request.

14 9th.

That the said corporation never was a citizen, resident, or inhabitant of the Territory of Idaho, but at all times was and now is organized and existing under the laws of the State of Minnesota, and that the indebtedness aforesaid from said Lipman to said corporation was incurred by him while he was a citizen, resident, and inhabitant of the Territory of Utah and doing business therein.

10th.

That afterwards, to wit, on the — day of November, 1887, and while the stock of goods and fixtures aforesaid were in the possession of the defendant, as sheriff aforesaid, by virtue of the writ of attachment aforesaid, the plaintiff, as assignee aforesaid, commenced this action in this court against the defendant herein to recover the possession of said stock of goods and fixtures or the value thereof in case delivery could not be had; and thereupon such proceedings were had that the possession thereof was delivered to this plaintiff; that thereupon the plaintiff sold and disposed of the same and of the proceeds thereof, and now retains in his possession, subject to
15 the final determination of this action, the sum of $4,000.00.

11th.

That prior to the taking of goods and fixtures aforesaid from the possession of plaintiff by the defendant under the writ of attachment issued in the action brought by the said St. Paul Knitting Works, corporation, against the said M. H. Lipman and after the recording of the deed of assignment aforesaid the said defendant, as sheriff aforesaid, had taken the property from the possession of the plaintiff under a writ of attachment issued at the suit of one other party, Kirkendall, Jones & Co., a copartnership of Nebraska, against the said M. H. Lipman, and the plaintiff had caused the same to be retaken from said defendant in an action of claim and delivery brought by the plaintiff against the defendant, which said action was then undetermined; that the amount claimed in said first action of attachment was $1,300.00, and the whole value of the goods situate in Idaho and under attachment and replevied in both actions aforesaid was about $5,000.00.

That the said goods and the stock of goods in Hailey were
16 in the month of September, 1887, taken from out of and shipped from the said Lipman's store, in the city of Salt Lake, Utah, and that the said Hailey store was a branch of the Salt Lake City store, and that from September, 1887, up to the time of making said assignment said Lipman had been doing business in Idaho in the running of said branch store at Hailey aforesaid.

12th.

That at the time of bringing this action defendant was wrongfully detaining said property from the possession of plaintiff.

The court finds the following conclusions of law, to wit:

1st. That the deed of assignment made by M. H. Lipman, of Salt Lake City, to the plaintiff herein and annexed to the said stipulation of facts and made a part thereof is a good and valid instrument and conveys title to the property in question herein.

2nd. That plaintiff is and at the time of bringing this action was entitled to the possession of the property in question.

3rd. That plaintiff should have judgment for damages by the defendant's wrongful detention of the same in the sum of
17 twenty-five one-hundredths ($\frac{25}{100}$) dollars, and should recover his cost herein to be taxed against defendant.

And judgment is hereby ordered to be entered accordingly.

Hailey, Oct. 11, 1889.

H. W. WEIR,
Judge of said Court.

(Endorsed:) J. Barnett *vs.* P. H. Kinney. Findings. Filed Oct. 11, 1889. S. H. Hays, clerk, by J. A. Hays, deputy.

18 In the District Court of the 2nd Judicial District of the Territory of Idaho in and for the County of Alturas.

Decree.

JOSIAH BARNETT
vs.
P. H. KINNEY.

OCTOBER 11, A. D. 1889.

This cause came on regularly for trial, Messrs. Kingsbury & McGowan appearing as counsel for the plaintiff and Messrs. Angel & Sullivan for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court, sitting without a jury, upon an agreed statement of facts, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that Josiah Barnett, plaintiff, do have and recover of and from P. H. Kinney, defendant, the sum of twenty-five hundredths dollars, with interest thereon at the
19 rate of 10 per cent. per annum from the date hereof until paid, together with said plaintiff's cost and disbursements incurred in this action, amounting to the sum of fifteen dollars.

Judgment rendered Oct. 11, A. D. 1889.

Clerk's Office of the District Court of the Second Judicial District in and for Alturas County, *ss:*

I, S. H. Hays, clerk of said court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause.

Attest my hand and seal of said court this 11th day of
[SEAL.] October, A. D. 1889.

S. H. HAYS, *Clerk,*
By J. A. HAYS,
Deputy Clerk.

(Endorsed:) District court, second district, Alturas county, Idaho Territory. Josiah Barnett *vs.* P. H. Kinney. Filed Oct. 11, 1889. S. H. Hays, clerk, by J. A. Hays, deputy.

20 In the District Court of the Second Judicial District, Idaho Territory, County of Alturas.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant.
} Certificate to Judgment-Roll.

I, the undersigned, clerk of the district court of the second judicial district of said Territory in and for said county, do hereby

certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book 5 of said court, at page 236; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of said district court this 11 day of October, A. D. 1889.

S. H. HAYS,
Clerk of the District Court,
By J. A. HAYS,
Deputy Clerk.

21 (Endorsed:) District court, second judicial district, Territory of Idaho, county of Alturas. Josiah Barnett, plaintiff, *vs.* P. H. Kinney, defendant. Judgment-roll. Filed October 11, 1889. S. H. Hays, clerk, by J. A. Hays, deputy clerk.

22 In the District Court of Second Judicial District of the Territory of Idaho in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant.
} Statement on Motion for New Trial.

To C. S. Varian & Kingsbury & McGowan, attorneys for the plaintiff, Josiah Barnett:

You will please take notice that the annexed contains the proposed statement on motion for a new trial of the defendant in the above-entitled cause.

Dated Oct. 17th, 1889.

ANGEL & SULLIVAN,
Att'ys for Def't.

Received the above mentioned proposed statement on motion for new trial this 17th day of October, 1889.

KINGSBURY & McGOWAN,
Att'ys for Plaintiff.

23 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant.

Defendant's Proposed Statement on Motion for a New Trial.

Be it remembered that this cause came regularly on for trial before the court without a jury on the 3rd day of June, 1889, Hon. H. W. Weir, judge of said court, presiding, upon the following agreed statement of facts, to wit:

24 In the Second Judicial District Court, Idaho Territory, County of Alturas.

JOSIAH BARNETT, Assignee, Plaintiff,
vs.
P. H. KINNEY, Defendant.
} Statement of Facts.

The plaintiff herein appears by his counsel, Kinsbury & McGowan and C. S. Varian, and the defendant appears by his counsel, Angel & Sullivan, and both parties hereby stipulate that the following is to be deemed and taken for the purpose of this case as a statement of the facts upon which judgment is to be pronounced:

1st. That heretofore, to wit, on the 23rd day of November, A. D. 1887, one M. H. Lipman was a citizen of the United States and of the Territory of Utah, residing and doing business as a merchant at Salt Lake City, in said Territory.

2nd. That on said day the said Lipman was the owner of real and personal property situate in said Territory of Utah and of certain personal property situate in said county of Alturas, in this the Territory of Idaho, to wit, of a certain stock of goods and
25 merchandise, consisting of clothing, men's furnishing goods, hats, caps, boots, and shoes, dry goods, fixtures, and goods of other descriptions, then being in a certain store-room on the north side of Merchant's hotel, corner of Main & Bullion streets, in the town of Hailey and Territory of Idaho.

3rd. That on said 23rd day of November, 1887, he, said Lipman, was largely indebted to divers persons, none of whom were then or are now citizens, residents, or inhabitants of the Territory of Idaho, and being unable then to pay all his said indebtedness in full he, the said Lipman, at the said city of Salt Lake, in the Territory of Utah, made, executed, and delivered under his hand and seal unto the plaintiff in this action, as his assignee, his deed of assignment in writing, which said deed was then and there duly acknowledged by the said Lipman before one Wm. M. Bradley, a notary public duly authorized, commissioned, and acting then and there under the laws of the said Territory of Utah, to whom he, the said Lipman, was then and there personally known; that he, the said Lipman, then and there executed the said deed freely and voluntarily and
26 for the uses and purposes therein mentioned; that the said notary then and there attached to said deed under his hand and seal of office his certificate of acknowledgment stating that he, the said Lipman, was personally known to the said notary to be the person named in and who executed the said deed, and that he acknowledged to him, the said notary, that he, the said Lipman, executed the same freely, voluntarily, and for the uses and purposes therein mentioned; that thereupon, on said day, the plaintiff herein in writing accepted the said deed and acknowledged the trust therein created and that he assumed the execution thereof.

4th. That by said deed of assignment the said Lipman granted, bargained, sold, conveyed, transferred, assigned, and delivered to the pl'ff all of his property, real and personal, wherever situate, including and particularly specifying the stock of goods hereinbefore

mentioned, together with all other property at the time belonging to him, in trust, to take possession of the same and by collection and sale by cash to convert the same into cash as speedily as might be, and out of the proceeds pay, first, the necessary expenses
27 of executing his trust, including a reasonable compensation for his services and for the services of his att'y; second, to pay in full if the proceeds were sufficient or *pro rata* if insufficient his creditors according to certain classes in said deed of assignment mentioned; that by said deed preferences were given and made in favor of certain creditors and against other creditors, all being designated by classes.

5th. That thereafter, to wit, on the 25th day of November, 1887, the plaintiff herein, as assignee aforesaid, entered into and took the actual possession of all and singular the stock of goods, fixtures, and personal property hereinbefore mentioned as situate in the town of Hailey, Territory of Idaho; that thereafter, to wit, on the 26 day of November, 1887, and before the taking of said property by the defendant herein as hereinafter mentioned the plaintiff, as assignee aforesaid, filed said deed of assignment for record in the office of the register of deeds for the county of Alturas, Territory aforesaid; that the defendant had actual knowledge and notice in all the premises.

6th. That said deed of assignment, which is hereby attached and made a part hereof, was and is valid by the laws of the Territory of Utah.

28 7th. That thereafter, on said 26th day of November, 1887, and while the plaintiff herein was in the actual possession of the stock of goods and fixtures hereinbefore mentioned, the defendant, as sheriff of the said county of Alturas, Territory of Idaho, under and by virtue of a writ of attachment theretofore issued out of this court in an action wherein St. Paul Knitting Works, a corporation, *were* plaintiff and the said M. H. Lipman was defendant, took from the possession of plaintiff the stock of goods and fixtures hereinbefore mentioned.

8th. That prior to and at the time of the commencement of the action by said corporation on which said writ of attachment was issued and of the taking into possession of the stock of goods and fixtures aforesaid by the defendant the said M. H. Lipman was justly indebted to the said corporation in the sum of $1,902.00 for goods and merchandise theretofore sold and delivered to him by said corporation at his request.

9th. That the said corporation never was a citizen, resident, or inhabitant of the Territory of Idaho, but at all times was and now is organized and existing under the laws of the
29 State of Minnesota, and that the indebtedness aforesaid from said Lipman to said corporation was incurred by him while he was a citizen, resident, and inhabitant of the Territory of Utah and doing business therein.

10th. That afterwards, to wit, on the — day of November, 1887, and while the stock of goods and fixtures aforesaid were in the possession of the defendant as sheriff aforesaid by virtue of the writ of attachment aforesaid the plaintiff, as assignee aforesaid, commenced

this action in this court against the defendant herein to recover the possession of said stock of goods and fixtures or the value thereof in case delivery could not be had, and thereupon such proceedings were had that the possession thereof was delivered to this plaintiff; that thereupon the plaintiff sold and disposed of the same, and of the proceeds thereof now retains in his possession subject to the final determination of this action the sum of $4,000.00.

11th. That prior to the taking of the stock of goods and fixtures aforesaid from the possession of plaintiff by the defendant under the writ of attachment issued in the action brought by the said St. Paul Knitting Works, corporation, against the said M. H.
30 Lipman and after the recording of the deed of assignment aforesaid the said defendant, as sheriff aforesaid, had taken the same property from the possession of the plaintiff under a writ of attachment issued at the suit of one other party, Kirkendall, Jones & Co., a copartnership of Nebraska, against the said M. H. Lipman, and the plaintiff had caused the same to be retaken from said defendant in an action of claim and delivery brought by this plaintiff against the defendant, which said action was then undetermined.

That the amount claimed in said first action of attachment was $1,300.00, and the whole value of the goods situate and attached and replevied in both actions in Idaho as aforesaid was about $5,000.

That the said goods and the stock of goods in Hailey were in the month of September, 1887, taken from out of and shipped from the said Lipman's store, in the city of Salt Lake, Utah, and that the said Hailey store was a branch of the Salt Lake store, and that from Sept., 1887, up to the time of making said assignment said Lipman had been doing business in Idaho in the running of said branch store at Hailey.

31 In witness whereof we, the respective parties to this action, by our attorneys herein, hereunto fix our names & seals & agree to the above stipulation of facts on this 3rd day of June, 1889.

KINGSBURY & McGOWAN, [SEAL.]
CHAS. S. VARIAN, [SEAL.]
Att'ys for Pl'ff.
ANGEL & SULLIVAN, [SEAL.]
Att'ys for Defendant.

(Endorsed:) In second dist. court, Idaho, county of Alturas. Josiah Barnett, as'gn., *vs.* P. H. Kinney. Stipulation of facts. No. 51. Filed June 3rd, 1889. S. H. Hays, clerk.

32 *Assignment for Benefit of Creditors.*

This indenture, made the twenty-third day of November, A. D. 1887, between M. H. Lipman, of the city and county of Salt Lake, in the Territory of Utah, the party of the first part, and Josiah Barnett, of Salt Lake City, Utah, as trustee, party of the second part, witnesseth: That the party of the first part has become indebted to various persons and parties in various sums and is unable to pay

his indebtedness and liabilities at maturity or with promptness and in full, and being desirous to assign all his property, credits, and effects, excepting only such as by law are exempt from execution, for the use and benefit of his creditors and to be applied to their prompt payment: Now, in consideration of the premises and of the sum of one dollar to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the party of the first part hereby grants, bargains, sells, conveys, transfers, assigns, and delivers to the party of the second part, as trustee, upon the trusts herein specified, the following property and effects, to wit, all of the following-described real estate situate, lying, and being in Salt Lake City, Salt Lake county, Utah, over and above an
33 interest therein and in the proceeds thereof to the amount and value of twenty-two hundred and fifty dollars, to wit: A part of lot four (4), in block forty (40), plat A, Salt Lake City survey, commencing at the southeast corner of said lot, running thence north ten (10) rods, thence west two (2) rods, thence south five (5) rods, thence west three (3) rods, thence south five (5) rods, thence east five (5) rods to the place of beginning, containing thirty-five (35) square rods of ground.

Said described real estate is subject to the lien of two certain mortgages now of record in the records of Salt Lake county, Utah, a particular description of which I cannot now give, and this assignment of said real estate and the reservation of my homestead exemption therein are made subject to the lien of said two mortgages, one of which secures a note held by T. R. Jones & Co., a particular description of which is not within my recollection, further than it is a note for $2,500.00 principal, and the
W. M. B., N. P. other of which secures a $2,000 overdraft with McCormick & Co., assigned this day to & held by Benjamin Wechster. Said real estate, with the dwelling-house and improvements thereon, constitute the homestead, where I now dwell with my family, consisting of myself, a wife, and three children. Said premises are of a greater value than twenty-two
34 hundred and fifty dollars, and the intention is to transfer, subject to the lien of said two mortgages, all said property over that amount and value, and to except an interest therein to the amount and value of twenty-two hundred and
W. M. B., N. P. fifty dollars as by law exempt from execution, and as said property is not divisible I agree and consent that the same may be sold, and if necessary I will join in the sale, and I empower the said assignee to make sale of the whole thereof, and that I will accept in lieu of my homestead exemption in the property the sum of twenty-two hundred and fifty dollars, and if any disagreement arises in regard to the amount or value of my homestead exemption I consent and agree that the same may be settled as provided in the eleventh subdivision of section 570 of the Civil Code of Utah, passed in 1884, the ex-
W. M. B., N. P. emption of a homestead exemption being only intended to be equal to what the law allows as exempt; also all my right, title, and interest in and to and of

the following-described lode mining claim situate,
W. M. B., N. P. lying, and being in Mineral Hill mining district,
Alturas county, Idaho Territory, located May 31st,
1880, by C. P. Croy and James Stafford, and known as and called
the Point Lookout, said lode mining claim being fifteen
35 hundred feet long and of record in the records of said mining district, to which reference is made for a more particular description of the claim.

Also the undivided one-half of that certain lode mining claim near the town of Vienna, in the Vienna mining district, Alturas county, Idaho, known and designated as the Emmett mine ledge or lode, being fifteen hundred feet in length by six hundred feet in width. This mining claim is subject to a deed given by me to David Adler and Sons, of Milwaukee, Wisconsin, to secure the payment of an account of something over three thousand dollars, the exact amount of which I cannot now state, due by me to them for merchandise bought.

Also an equitable right, title, interest, and ownership of one-half undivided in and to the building and lease formerly owned by J. Behrman, at Sandy, Utah, a more particular description of which I cannot give.

Also a certain indenture of lease, dated September 1st, 1887, made by Mathew H. Walker to the party of the first part hereto of the following-described real estate situate in Salt Lake City, Salt
Lake county, Utah, to wit: A portion of lot four (4), in block
36 seventy (70), plot A, Salt Lake City survey, commencing at the southwest corner of said lot four (4), running thence north fifty-nine feet and six inches to the south wall of the store now occupied by Sam Levy; thence east fifty-seven and one-third feet; thence north twenty-four and two-thirds feet to the south wall of the store now occupied as a saloon by William Schade; thence east twenty-four feet to the west line of the Kentucky Liquor Company's store; thence south along said last-mentioned line eighty-four and a half feet to the north line of Second South street; thence west along said north line of Second South street eighty and a half feet to the point of beginning. The party of the first part hereto has, under and by virtue of said lease, sublet to A. C. Smith & Co. that part of said premises described which is now occupied by them, and the assignment of the above-described lease is made subject to said sublease and the right of occupancy granted thereby.

Also said sublease to said A. C. Smith & Co. and all rents and dues accruing thereunder and all other rights coming to the party of the first part hereto by virtue thereof, and a particular description of said sublease the party of the first part is not able to give.

Also a lease of twenty by sixty feet of ground and the
37 building thereon on the north side of the Merchants' hotel, corner of Main and Bullion streets, in Hailey, Idaho, said lease having been made to the party of the first part hereto by the owner of said property on or about September 15th, 1887, to run one year, rent payable from month to month, said twenty by sixty feet of ground and the building thereon being used and occupied

by the party of the first part hereto in carrying on his business at Hailey, Idaho. The party of the first part hereto is unable to give a more particular description of said lease.

Also a certain mortgage, dated January 3rd, 1884, made by W. H. Liter to the party of the first part hereto, recorded in the Wasatch county, Utah, records January 9th, 1884, in book "I," at pages four ninety-six to four ninety-eight, inclusive, and the promissory notes and indebtedness referred to.

Also all lands and real estate and all rights, titles, and interests of any and every kind therein which I may own or possess or be in any wise entitled to, and, though I think the foregoing-described parcels and interest constitute all my real estate and interest therein, in case it shall be found I have any other the party of the
38 second part is authorized to take possession of and sell and transfer the same as part of the trust property as fully as if particularly described and referred to herein.

I also assign, transfer, set over, and deliver the following personal property, choses in action, and effects, to wit, ninety-nine hundred and thirty-one and one-fourth shares of the capital stock of the Morning Star Silver Mining Company and the certificate representing the same, being certificate number seventy-three, standing in the name of W. S. McCormick, said ninety-nine hundred and thirty-one and one-fourth shares being in the hands of said McCormick as collateral security for the payment of the overdraft of the party of the first part hereto at the bank of said McCormick, in Salt Lake City, Utah, amounting to the sum of ten thousand three hundred and seventy-six dollars and seventy-three cents, and this assignment of said shares is made subject to the lien of said McCormick on said shares.

Also twenty thousand shares of the capital stock of the Morning Star Silver Mining Company and the certificate representing the same, being certificate number seventy-two, standing in the
39 name of W. S. McCormick, said twenty thousand shares being pooled and in the hands of said McCormick subject to a certain escrow agreement, which has been deposited with him as trustee, and said shares are outside of and beyond said pool and escrow, in the hands and possession of said McCormick as security for the same overdraft above mentioned and described, and this assignment of said twenty thousand shares described is made subject to said pool and escrow and further subject to the lien of said McCormick on said shares.

Also one share of capital stock of the Manhattan Land and Cattle Company, unissued.

Also ten shares of the capital stock of the California Mining Company and the certificate representing the same, being certificate number ninety-nine thousand two hundred and sixty-four, dated August 5th, 1880.

Also three certain policies of fire insurance, each and all taken out by William E. Smedley, at Salt Lake City, on the merchandise of the party of the first part hereto in his store and store-rooms in Salt Lake City, one for five thousand dollars, dated August 20th,

1887; one for five thousand, dated September 1st, 1887, and
40 the third for five thousand dollars, dated October 1st, 1887.
A more particular description of said policies the party of the first part is now unable to give.

Also four certain fire insurances polices taken out by Hugh Anderson, agent at Salt Lake City, the first for five thousand dollars, dated August 20th, 1887; the second for five thousand dollars, dated October 1st, 1887, and the third for twenty-five hundred dollars, dated October 9th, 1887, all three on the stock of merchandise in Salt Lake City, of the party of the first part, and the fourth for five hundred dollars, dated August 21st, 1887, on the fixtures and furniture in the store on Main street, in Salt Lake City, Utah, occupied by the party of the first part as his place of business. A more particular description of said four policies the party of the first part is unable to give, but this assignment is intended to and shall pass to the party of the second part any and all policies of insurance on the stock of goods or personal property or any part of the same in my store or store-room in Salt Lake City and in Hailey and elsewhere and on any real and personal estate belonging to me or in which I have any interest, wheresoever the
same may be situated; also all my stock of goods, wares,
41 and merchandise of every description whatever, consisting
of clothing, hats, caps, boots, and shoes, gents' furnishing goods, and dry goods and goods of other descriptions, situated in my store and store-rooms at numbers one seventy-five and one seventy-seven South Main street, in Salt Lake City, Utah, and also in Hailey, Idaho, in the building there occupied by me in my business, and also elsewhere, and also all other goods, chattels, effects, personal property, choses in action, credits, accounts, bills receivable and assetts, including all moneys and all other personal property of every kind, nature, and description, and any and all interest and rights therein and thereto which I may own or possess, wheresoever the same may be situated.

It has been found impos-ible to schedule my personal property, assets, and effects any more particularly than herein done, and I authorize the party of the second part to take possession of, as part of the trust property, all my personal property and effects as fully as if the same were specially enumerated and scheduled. This
conveyance, assignment, and transfer is made to the party of
42 the second part as trustee and upon the following trust, to
wit: He is to take possession of said property and by collection and sale for cash convert the same into cash as speedily as may be, and out of the proceeds pay:

First. Necessary expense of executing the trust, including a reasonable compensation for his services and for the services of his attorney.

Second. To pay in full, if the proceeds are sufficient, and *pro rata* if insufficient to pay in full, the following creditors and debts of the party of the first part:

W. S. McCornick, overdraft on my account at the bank of W. S. McCornick, doing business in Salt Lake City in the name of Mc-

Cornick & Company, amounting to the sum of ten thousand three hundred and seventy-six dollars and seventy-three cents, due to said McCornick.

Union National Bank of Salt Lake City, Utah, my note to said bank, dated October 15th and due December 15th, 1887, for one thousand dollars and interest at one per cent. per month from date until paid, no part of which has been paid.

Morris Hoffman, two hundred and seventy-five dollars,
43 balance of wages due by me to him as clerk in my store at a salary of one hundred dollars per month.

Any error of description is not to vitiate the claim, the intent being that the creditors named in this class shall be first paid their just demands, whether their claims be correctly scheduled or not.

Third. After paying the foregoing classes in full to pay in full the following creditors if the assets are sufficient, otherwise to pay *pro rata*, to wit:

Benjamin Wechsler, $2,000, overdraft with Mc-
W. M. B., N. P. Cornick & Co., assigned this day, with trust deed securing the same on the homestead, as hereinbefore mentioned.

Benjamin Wechsler, a balance of five thousand and nine dollars and fourteen cents due by me to him on open running cash account extending from January 3rd, 1880, to November 11th, 1887.

Benjamin Wechsler, my note to him, dated August 3rd, 1883, payable two years after date, for three thousand dollars, with interest at ten per cent. per annum from date till paid, both before and after judgment, negotiable and payable at the banking-house of McCornick & Company, of Salt Lake City, no part of which has been paid.

44 Esther J. Levy, my note to her, dated December 4th, 1884, payable two years after date at the office of A. and J. Levy, of New York city, for eleven hundred and fifty dollars, with interest at ten per cent. per annum from date till paid, both before and after judgment, no part of which has been paid.

Abraham Levy, my note to him, dated September 7th, 1885, payable two years after date to my order, for two thousand dollars, with interest payable at the office of A. and J. Levy, New York city, and endorsed by me and owned and held by said Abraham Levy, no part of which has been paid.

Julia Lipman, my note to her, dated January 3rd, 1880, payable five years after date at the banking house of McCornick & Co., of Salt Lake City, for twenty hundred and eighty dollars, with interest at ten per cent. per annum from date till paid, both before and after judgment, no part of which has been paid.

Max N. Lippman, my note to him, dated September 17th, 1887, payable one day after date, for forty-three hundred dollars and fifteen cents, no part of which has been paid.

Max N. Lipman, two hundred dollars for wages due to him from me for his services as employee in my business from
45 September 17th, 1887, up to date.

Any error of description is not to vitiate the claim, the in-

terest being that the creditors named in this class shall be paid their just demands as aforesaid, whether their claims be correctly scheduled or not.

Fourth. After paying the foregoing classes in full to pay in full the following creditors if the assets are sufficient, otherwise to pay *pro rata*, to wit: Levy and Wechsler, of New York city, fifteen hundred and forty-seven dollars and thirty-six cents, due by me to them on open running account for merchandise bought.

Hirschkind & Co., of New York city, my note to them, dated June 22nd, 1887, payable five months after date at National Park bank, New York city, for five hundred and twelve dollars and fifty cents, no part of which has been paid.

Hirschkind & Co, balance of open running merchandise account due by me to them, to wit, nine hundred and eighty-two dollars and two cents.

Stern & Co., my note to them for four hundred and ninety-two dollars and eighty-seven cents, dated August 27th, 1887, payable sixty days after date, no part of which has been paid.

46 A. and J. Levy, due from me to them on account for merchandise, five hundred and eighty-six dollars.

Stern, Falk & Co., my note to them for four hundred and forty-three dollars, dated March 5th, 1887, payable four months after date at National Park bank, New York, no part of which has been paid except the sum of two hundred dollars paid thereon August 19th, 1887.

Stern, Falk & Co., due from me to them on merchandise account, four hundred and ninety-two dollars.

Earl and Wilson, due by me to them on merchandise account, eight hundred and sixty-three dollars.

J. E. Shields & Co., due by me to them on merchandize account, three hundred and ninety-five dollars and eighty-nine cents.

Leak Glove Company, due by me to them on merchandise account, two hundred and fifty dollars.

The description of the foregoing debts is as correct as I can now make it, and any error of description is not to vitiate the claim, the intent being that the creditors named in this class shall be paid their just demands as aforesaid, whether their claims be correctly stated or not.

Fifth. After paying all the foregoing classes of creditors in full to pay in full, or *pro rata* if proceeds are insufficient to pay
47 in full, all my other creditors and debts and legal liabilities of every name, kind, and nature whatsoever, and the following list embraces all now known to me, with the amounts due to each respectively set opposite his or their name, but the list given is not intended to exclude any others that may exist, and the amounts stated as due to each are as near as I can now fix the same, and any error of statement in the amount is not to vitiate the claim of the party opposite whose name it is placed, to wit:

W. M. B., N. P. Note for $2,500 held by T. R. Jones & Co., secured by mortgage on homestead hereinbefore mentioned, a particular description of which is not within my recollection.

Weil, Dreyfus & Co.	$289	65
Neustadler Bros.	1,768	25
Buell Manufacturing Co.	2,346	66
Brown Bro. & Co.	2,046	25
W. M. B., N. P. J. Baum & Co. (assigned to Greenbaum & Co.)	400	00

Contingent liability on note for $140 made by Jno. W. Tate to Zion's savings bank, not due, endorsed by me.

W. & I. Steinhart	$491	75
Triest & Co.	1,453	06
Merced woolen mills	349	43
H. W. King & Co.	1,228	38
Greenbaum, Weil & Michels	576	00
48 Romadka Bros.	1,473	25
Keith Bros. & Co.	1,259	50
Martin Sachs & Co.	1,188	50
Pioneer woolen mills	1,022	18
Smith & Sanford	960	00
Ellithorp, House & Steele	324	00
St. Paul knitting works	1,902	00
Angora Robe & Glove Co.	988	50
California Hosiery Co.	2,379	78
Walter H. Tenny & Co.	1,642	50
Gauss Shelton Hat Co.	512	00
Reed, Jones & Co.	1,213	98
Lewis Meyersheim	953	96
Kitzinger, Fuholsky & Frohlichstein	407	00
Feigenbaum & Co.	519	05
G. W. Sanders & Co.	242	28
David Adler & Sons	3,093	00

To have and to hold the conveyed and transferred property to the party of the second part upon the trusts aforesaid and to his assigns forever.

And the party of the second part accepts this conveyance and assumes the due execution of the trusts declared.

In witness whereof the party of the first part has hereto set his hand and seal the day and year aforesaid, and the party of the second part, as evidence of his acceptance, has hereunto subscribed his name.

M. H. LIPMAN. [SEAL.]
JOSIAH BARNETT. [SEAL.]

In presence of—
WM. M. BRADLEY.

49 TERRITORY OF UTAH, } ss:
Salt Lake County, }

On this 23rd day of November, 1887, before me, William M. Bradley, a notary public in and for said county, duly commissioned and qualified, personally came M. H. Lipman, who is personally

known to me to be the person named in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned. Red-ink interlineations made before signing.

Witness my hand and official seal, at my office, in Salt Lake City, Utah Territory, the day and year first above written.

[NOTARIAL SEAL.] WM. M. BRADLEY,
Notary Public, Salt Lake Co., Utah.

(Endorsed:) Assignment for benefit of creditors. M. H.
50 Lipman to Josiah Barnett. Dated Nov. 23rd, 1887. Recorded at request of Chas. J. Selwyn. Territory of Idaho, county of Alturas, *ss:* I hereby certify that this was filed for record in my office at 9.05 o'clock a. m., Nov. 26, 1887, and is duly recorded in Book "B," Miscel-aneous, pages No. 94 to 106, inclusive. John M. Cannady, county recorder. Filed June 3rd, 1889. S. H. Hays, clerk.

That thereafter and on said third day of June, 1889, this cause was tried to the court upon said agreed statement of facts, a jury having been expressly waived by the parties thereto, & no other evidence than said statements of facts was offered, Kingsbury & McGowan & C. S. Varian appearing as attorneys for the plaintiff, and Angel & Sullivan as attorneys for the defendant.

After argument by the respective counsel the court took the same under advisement, and on the 11th day of October, 1889, filed with the clerk of said court written findings of fact and conclusions of law in words and figures as follows, to wit:

51 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant. } Findings.

This cause having been heretofore, on the 3d day of June, 1889, submitted to the court for decision upon the complaint of the plaintiff and the answer of the defendant, filed herein, after hearing arguments by the counsel for the respective parties, *and* the court, being fully advised, now finds the following facts:

1st.

That heretofore, to wit, on the 23d day of November, 1887, one M. H. Lipman was a citizen of the United States and of the Territory of Utah, residing and doing business at Salt Lake City, Utah Territory.

2nd.

That on said day the said Lipman was possessed of and was the owner of real and personal property situate in the Territory of

Utah and of certain personal property situate in said county
52 of Alturas, in the Territory of Idaho, to wit, of a certain stock of goods and merchandise, consisting of clothing, men's furnishing goods, hats, caps, boots and shoes, dry goods, fixtures, and goods of other descriptions, then being in a certain store-room on the north of the building known as "Merchants' hotel," in the town of Hailey and Territory of Idaho.

3rd.

That on said 23d day of November, 1887, the said Lipman was largely indebted to divers persons, none of whom were then or are now citizens, residents, and inhabitants of Idaho, and that said Lipman was then insolvent; he made, executed, and delivered under his hand and seal unto the plaintiff in this action, as his assignee, the deed of assignment in writing, which said deed was then and there duly acknowledged by the said Lipman before one Wm. M. Bradley, a notary public, duly authorized, commissioned, and acting then and there under the laws of the said Territory of Utah, to whom the said Lipman was then and there personally known; that the said Lipman then and there executed the said deed freely and voluntarily and for the uses and purposes therein mentioned; that the said notary then and there attached to said deed, under his
53 hand and seal of office, his certificate of acknowledgement, stating that he, the said Lipman, was personally known to the said notary to be the person named in and who executed the said deed, and that he acknowledged to him, the said notary, that he, the said Lipman, executed the same freely and voluntarily and for the uses and purposes therein mentioned; that thereupon, on said day, the plaintiff herein, in writing, accepted the said deed and acknowledged the trust therein created, and that he assumed the execution thereof.

4th.

That by said deed of assignment the said Lipman granted, bargained, sold, conveyed, transferred, assigned, and delivered to the plaintiff all of the property, real and personal, wherever situate, including and particularly specifying the stock of goods hereinbefore mentioned, together with all other property at the time belonging to him, in trust, to take possession of the same, and by collection and sale for cash as speedily as might be, and out of the proceeds pay, first, the necessary expenses of executing his trust, including reasonable compensation for his services and for the services of his attorneys; second, to pay in full if the proceeds were sufficient, or *pro rata* if insufficient, his creditors, according to certain
54 classes in said deed of assignment mentioned; that by said deed preferences were given and made in favor of certain creditors and against other creditors, all being designated by classes.

5th.

That thereafter, to wit, on the 25th day of November, 1887, the plaintiff herein, as assignee as aforesaid, entered into and took actual

possession of all and singular of the stock of goods, fixtures, and personal property hereinbefore mentioned as situate in the town of Hailey, Territory of Idaho; that thereafter, to wit, on the 26th day of November, 1887, and before the taking of said property by the defendant herein as hereinafter mentioned the plaintiff, as assignee aforesaid, filed said deed of assignment for record in the office of the register of deeds for the county of Alturas, Territory aforesaid; that the defendant had actual knowledge and notice in all the premises.

6th.

That said deed of assignment was and is valid by the laws of the Territory of Utah.

7th.

That thereafter and on said 26th day of November, 1887, and while the plaintiff herein was in the actual possession of the stock of goods and fixtures hereinbefore mentioned the defend-
55 ant, as sheriff of said county of Alturas, Territory of Idaho, under and by virtue of a writ of attachment theretofore issued out of this court in an action wherein St. Paul Knitting Works, a corporation, *were* plaintiff and the said M. H. Lipman was defendant, took from the possession of plaintiff the stock of goods and fixtures hereinbefore mentioned.

8th.

That prior to and at the time of the commencement of the action by said corporation on which said writ was issued and of the taking into possession of the stock of goods and fixtures aforesaid by the defendant the said M. H. Lipman was justly indebted to the said corporation in the sum of nineteen hundred and two (1,902) dollars for goods and merchandise theretofore sold and delivered to him by said corporation at his request.

9th.

That the said corporation never was a citizen, resident, or inhabitant of the Territory of Idaho, but at all times was and now is organized and existing under the laws of the State of Minnesota, and that the indebtedness aforesaid from said Lipman to said corporation was incurred by him while he was a citizen, resident, and inhabitant of the Territory of Utah and doing business therein.

56 10th.

That afterwards, to wit, on the — day of November, 1887, and while the stock of goods and fixtures aforesaid were in the possession of the defendant as sheriff aforesaid by virtue of the writ of attachment aforesaid the plaintiff, as assignee as aforesaid, commenced this action in this court against the defendant herein to recover the possession of said stock of goods and fixtures or the value thereof in case delivery could not be had, and thereupon such proceedings were had that the possession thereof was delivered

to this plaintiff; that thereupon the plaintiff sold and disposed of the same and of the proceeds thereof, and now retains in his possession, subject to the final determination of this action, the sum of $4,000.00.

11th.

That prior to the taking of the stock of goods and fixtures aforesaid from the possession of the plaintiff by the defendant under the writ of attachment issued in the action brought by the said St. Paul Knitting Works, corporation, against the said M. H. Lipman and after the recording of the deed of assignment aforesaid the said defendant, as sheriff aforesaid, had taken the property from the possession of the plaintiff under a writ of attachment issued at
57 the suit of one other party, Kirkendall, Jones & Co., a copartnership of Nebraska, against the said M. H. Lipman, and the plaintiff had caused the same to be retaken from said defendant in an action of claim and delivery brought by the plaintiff against the defendant, which said action was then undetermined.

That the amount claimed in said first action of attachment was $1,300.00, and the whole value of the goods situate in Idaho and under attachment and replevied in both actions aforesaid was about $5,000.00.

That the said goods and stock of goods in Hailey were in the month of September, 1887, taken from out of and shipped from the said Lipman's store, in the city of Salt Lake, Utah, and that the said Hailey store was a branch of the Salt Lake City store, and that from September, 1887, up to the time of making said assignment said Lipman had been doing business in Idaho in the running of said branch store at Hailey aforesaid.

12th.

That at the time of bringing this action defendant was wrongfully detaining said property from the possession of plaintiff.

The court finds the following conclusions of law, to wit:

58 1st.

That the deed of assignment made by M. H. Lipman, of Salt Lake City, to the plaintiff herein and annexed to the said stipulation of facts and made a part thereof is a good and valid instrument and conveys title to the property in question therein.

2d.

That plaintiff is and at the time of bringing this action was entitled to the possession of the property in question.

3rd.

That plaintiff should have judgment for damages by the defendant's wrongful detention of the same in the sum of twenty-five one-hundredths ($\frac{25}{100}$) dollars, and should recover his costs herein, to be taxed against defendant.

And judgment is hereby ordered to be entered accordingly. Hailey, Oct. 11th, 1889.

H. W. WEIR,
Judge of said Court.

59 *Specification of Error Relied on by the Defendant for a New Trial.*

First. The court erred in finding the 12th finding of fact, to wit, that at the time of bringing this action defendant was wrongfully detaining said property from the possession of the plaintiff.

That the agreed statement of facts does not justify said finding, but does warrant the finding that said property was rightfully detained by the defendant, and that he, def't, was entitled to the possession thereof.

Second. The court erred in finding the first conclusion of law in this: In finding that the deed of assignment made by M. H. Lipman and annexed to said stipulation of facts & made a part thereof is a good and valid instrument and conveys title to the property in question herein; that said stipulation of facts does not warrant such a conclusion of law, but does warrant a conclusion that said deed of assignment was invalid and did not convey title to the property in question herein.

Third. The court erred in finding the second conclusion of law, that said stipulation of fact does not warrant such a conclusion, but, on the contrary, does warrant a conclusion that the plaintiff is not & at the time of this action was not entitled to the possession of the property in question.

60 Fourth. That the court erred in finding the 3rd conclusion of law for the reason that said stipulation of facts does not warrant or sustain such a conclusion, but does warrant the conclusion that plaintiff is not entitled to any sum whatever as damages.

Fifth. The court erred in ordering judgment to be entered in accordance with said findings of fact & conclusions of law for the reason that said stipulation of facts does not warrant any such conclusion or order.

On this statement and several specifications of the grounds relied on by the defendant for a new trial and hereinbefore specified the defendant asks that the decision heretofore entered in this cause be set aside and a new trial granted.

ANGEL & SULLIVAN,
Attorneys for Defendant.

TERRITORY OF IDAHO, } *ss:*
County of Alturas, }

The within statement is agreed to as correct.

ANGEL & SULLIVAN,
Att'ys for Def't.
KINGSBURY & McGOWAN,
Attorneys for Plaintiff.

61 TERRITORY OF IDAHO, } ss:
County of Alturas, }

This certifies that the within & foregoing statement is correct and the same is allowed.

Dated October 29th, 1889.

H. W. WEIR,
Judge of said Court.

Endorsed: Filed Nov. 9th, 1889. S. H. Hays, clerk, by J. A. Hays, deputy.

In the District Court of the Second Judicial District of the Territory of Idaho in & for Alturas County.

JOSIAH BARNETT, Plaintiff, } Notice of Intention to Move for
v. a New Trial.
P. H. KINNEY, Defendant. }

To C. S. Varian & Kingsbury & McGowan, attorneys for plaintiff:

Please take notice that the defendant, P. H. Kinney, intends to move the court to vacate and set aside the decision of the court rendered in the above-entitled cause upon the following grounds, to wit:

62 First. Insufficiency of the evidence to justify the decision.

Second. That said decision is against law.

Third. That the findings of fact & law were not filed within the time required by law. Said motion will be heard upon a statement of the case hereafter to be prepared & served upon you.

ANGEL & SULLIVAN,
Att'ys for Defendant.

Service of the within by copy admitted this fourteenth day of October, A. D. 1889.

Dated Oct. 14th, 1889.

KINGSBURY & McGOWAN,
Att'ys for Pl'ff.

Endorsed: In district court, Alturas county, Territory of Idaho. Josiah Barnett *vs.* P. H. Kinney. Notice of motion of intention to move for a new trial. Filed Oct. 17th, 1890. S. H. Hays, clerk, by J. A. Hays, deputy. Angel & Sullivan, atty's for def't.

63 In the District Court of the Second Judicial District of the Territory of Idaho in a- for Alturas County.

JOSIAH BARNETT, Plaintiff, } Order Overruling Motion
vs. for a New Trial.
P. H. KINNEY, Defendant. }

Now, on this 6th day of November, A. D. 1889, the above-entitled cause came on for hearing on defendant's motion for a new trial, Kingsbury & McGowan appearing as attorneys for the plaintiff and

Angel & Sullivan appearing for the defendant, and, being fully advised in the premises, it is ordered that said motion for a new trial be, and the same is hereby, overruled; to which ruling the defendants then and there excepted.

Done at chambers this 6th day November, A. D. 1889.

H. W. WEIR,
Judge of said Court.

Endorsed: In the district court second judicial district, Alturas county, Idaho Territory. Josiah Barnett, pl'ff, *vs.* P. H. Kinney, def't. Order overruling motion for new trial. Filed Nov. 9th, 1889. S. H. Hays, clerk, by J. A. Hays, deputy.

64 In the District Court of the Second Judicial District of the Territory of Idaho in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant. } Notice of Appeal.

Please take notice that the defendant (P. H. Kinney) in the above-entitled action appeals to the supreme court of the Territory of Idaho from the judgment therein made and entered in the said district court on the 11th day of October, A. D. 1889, in favor of plaintiff and against the defendant and from the whole thereof, and also from the order made on the 6th day of November, A. D. 1887, overruling defendant's motion for a new trial and from the whole thereof.

To the clerk of said court and to C. S. Varian & Kingsbury & McGowan, attorneys for plaintiff, Josiah Barnett.

Dated December 4th, 1889.

ANGEL & SULLIVAN,
Att'ys for Defendant.

(Endorsed:) Service by copy of the within notice of appeal made this 4th day of December, 1889. Kingsbury & McGowan, att'ys for pl'ff.

65 (Endorsed:) In district court, Alturas county, Idaho Territory. Josiah Barnett, pl'ff, *v.* P. H. Kinney, def't. Notice of appeal. Filed Dec. 4, 1889. S. H. Hays, clerk, by J. A. Hays, deputy. Angel & Sullivan, att'ys for def't.

In the District Court of the Second Judicial District of the Territory of Idaho in and for Alturas County.

JOSIAH BARNETT, Plaintiff,
vs.
P. H. KINNEY, Defendant. } Undertaking on Appeal.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of the Territory of Idaho from a judgment entered against P. H. Kinney, the defendant in said action, in the district court of the second judicial district of the Territory of

Idaho in and for Alturas county, in favor of the plaintiff
66 in said action, on the 11th day of October, A. D. 1889, for $\frac{31}{100}$ dollars damages and fifteen dollars costs of suit;

Also is about to appeal from an order made and entered on the 6th day of November, A. D. 1889, overruling defendant's motion for a new trial:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the Territory of Idaho, do hereby jointly and severally undertake and promise on the part of appellant that the said appellant will pay all damages & costs which may be awarded against P. H. Kinney (the appellant) on the appeal or on a dismissal thereof, not exceeding three hundred ($300) dollars, to which amount we acknowledge ourselves jointly and severally bound.

W. T. RILEY. [SEAL.]
J. H. BEAMER. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

TERRITORY OF IDAHO, } ss:
County of Alturas, }

W. T. Riley and J. H. Beamer, being each for himself duly sworn, deposes and says that he is a resident and freeholder of said county and Territory, and that he is worth the sum set forth in the foregoing undertaking as the penalty thereof over and above all
67 his debts, liabilities, and property exempt by law from execution or attachment.

W. T. RILEY.
J. H. BEAMER.

Subscribed & sworn to before me this 7th day of December, A. D. 1889.

S. H. HAYS, *Clerk,*
By J. A. HAYS, *Deputy.*

(Endorsed:) Dist. court, Alturas county, Idaho Ter. Josiah Barnett *vs.* P. H. Kinney. Undertaking on appeal. Filed Dec. 7th, 1889. S. H. Hays, clerk, by J. H. Hays, deputy.

TERRITORY OF IDAHO, } ss:
County of Alturas, }

I, S. H. Hays, do hereby certify that the foregoing are full, true, and correct copies of the answer, complaint, clerk's certificate to judgment-roll, demurrer, decree, findings, notice of intention to move for a new trial, order overruling motion for a new trial, statement on motion for a new trial, notice of appeal, and undertaking on appeal in the cause of Josiah Barnett against P. H. Kinney, and an undertaking in due form has been properly filed.

Seal District Court, 2nd Judicial District, Idaho Territory.

68 Witness my hand and the seal of the district court this twenty-third day of December, A. D. 1889.

S. H. HAYS,
Clerk District Court,
By J. A. HAYS, *Deputy.*

69 BOISÉ CITY, IDAHO, *Jan. 21st*, 1890.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Willis Sweet, associate justice, and the officers of the court—when the following, among other, proceedings were had, to wit:

JOSIAH BARNETT, Pl'ff & Resp.,
v.
P. H. KINNEY, Def't & App. } Second District, Alturas County.

This day come Angel and Sullivan, of counsel for app-llant, and moves the court to place this cause upon the calendar, which motion was granted by the court.

JANUARY 22D, 1890.

Present the same as yesterday.

JOSIAH BARNETT, Pl'ff & Resp.,
v.
P. H. KINNEY, Def't & App. } Second District, Alturas County.

70 On motion of respondent, it is ordered that C. S. Varian, of counsel for respondent, have leave until Saturday, the 25th instant, in which to file an additional brief herein.

JANUARY 27TH, 1890.

Present the same as January 22d, 1890.

JOSIAH BARNETT, Pl'ff & Resp.,
v.
P. H. KINNEY, Def't & App. } Second District, Alturas County.

This day this cause came on for hearing, Angel & Sullivan appearing — appellant and Kingsbury & McGowan appearing for the respondent; and, after the hearing of the argument, the case was taken under advisement by the court.

71 MARCH 5TH, 1890.

Present the same as Jan. 27th, 1890.

JOSIAH BARNETT, Pl'ff & Resp.,
v.
P. H. KINNEY, Def't & App. } Second District, Alturas County.

And now, at this day, this cause being called, and having been

heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is rendered by Mr. Justice Sweet to the effect that the judgment of the court below be reversed and the cause remanded to the lower court, with instructions to enter judgment for the defendant in accordance with the opinion herein—

Mr. Chief Justice Beatty concurring specially, Mr. Justice Berry dissenting.

72 Whereupon it is now con*con*sidered, ordered, adjudged, and decreed by the court here that the judgment of the district — of the second judicial district in and for the county of Alturas in the above-entitled cause be, and the same is hereby, reversed, and the cause is remanded to the lower court, with instructions to enter judgment for the defendant in accordance with the opinion herewith.

A stay of remittitur herein is granted for sixty days.

JAS. H. BEATTY,
Chief Justice.

STATE OF IDAHO, *ss:*

Supreme Court.

I, Sol. Hasbrouck, clerk of the supreme court of Idaho, do hereby certify that the foregoing are true copies of the judgment-roll in the district court of 2d jud'l district, of the papers on appeal to this court, of the record entries in this court, and of the opinion of this supreme court in the case wherein Josiah Barnett is pl't'ff & respondent and P. H. Kinney is def't & app'l't, of record in this court and of the whole thereof.

Supreme Court Seal, Idaho Territory.

Witness my name, hereto signed, and the seal of said supreme court, hereto affixed. Done at Boisé City this 24th day of July, 1890.

SOL. HASBROUCK, *Clerk.*

73 In the Supreme Court of Idaho Territory, January Term, 1890.

JOSIAH BARNETT, Plaintiff and Respondent,
vs.
P. H. KINNEY, Defendant and Appellant.

Angel and Sullivan, attorneys for appellant.

Kingsbury and McGowan and C. S. Varian, attorneys for respondent.

Appeal from the second district.

SWEET, *J.:*

On the 23rd day of November, 1887, M. H. Lipman, a citizen of Utah, doing business at Salt Lake City, made an assignment to plaintiff herein in trust for all his creditors. The deed of assignment carried with it certain personal property situated in Hailey,

Alturas county, Idaho Territory, to wit, a stock of goods and merchandise.

It is admitted that at the time the assignment was made said Lipman was insolvent; that in all respects the assignment made was in conformity with the laws of Utah Territory, and that under said deed of assignment the creditors of said assignor were divided into classes, certain classes being therein designated as preferred creditors, and said assignee being instructed by said deed of assignment to observe said preferences in settling the liabilities of
74 the assignor as fast as the sale of said merchandise enabled him to do so.

On the 25th day of November, 1887, plaintiff, as said assignee, took possession of the said stock of goods situated in Hailey, in said Alturas county, Idaho Territory, having first caused to be duly recorded in said county the said deed of assignment.

On the following day, to wit, the 26th day of November, 1887, defendant herein, then the duly qualified and acting sheriff of said Alturas county, levied upon and took possession of said goods under and by virtue of a writ of attachment issued out of the district court of the second judicial district of Idaho Territory in and for said Alturas county in an action wherein the St. Paul Knitting Works Company, a corporation, was plaintiff and the said M. H. Lipman was defendant.

On the 12th day of December, 1889, plaintiff commenced an action in said court against the defendant herein for the recovery of the possession of said goods and chattels or for the sum of $5,000, the value thereof, in case a delivery of the same could not be had. Plaintiff obtained judgment in the lower court, took possession of said goods, and thereupon proceeded to sell the same, realizing therefrom the sum of $4,000. Defendant appealed from said judgment, and the assignee now holds said sum of money subject to the final determination of this litigation.

By a careful examination of the findings of the lower court we find that the issues here presented are clearly and distinctly set forth. They are, in brief, to recapitulate, as follows:

The assignor, at the time of making said assignment, was a non-resident of this Territory. The assignment was made in strict conformity with the laws of Utah Territory, of which he
75 was a citizen. The attaching creditor was also a non-resident of Idaho, and it is conceded that said Lipman was justly indebted to said corporation in the sum of $1,902; that at the time the writ of attachment was levied the assignee was in possession of the goods, and that the deed of assignment had been duly recorded in said county; also that the defendant was the duly qualified and acting sheriff of said Alturas county.

The legal questions involved are as follows:

May a non-resident make an assignment, with preferences, of personal property situated in this Territory that will be valid as against a non-resident attaching creditor?

And this question further involves the effect, first, of possession by the assignee when the attachment is levied; second, the rule of

comity between the States; and, third, the effect of the attaching creditor being a resident or a non-resident of the Territory.

We premise a discussion of these questions with the remark that a decision by the United States Supreme Court is binding upon us, and that whenever any issue presented here has been clearly and distinctly settled by said court we need look no farther.

We will first take up the question of citizenship, and we submit it in this form:

Will the courts of this Territory concede to any of its citizens any rights or privileges under its attachment laws not extended to any citizen of the United States who is a non-resident of the Territory?

The attachment laws of this Territory give no preferences as between resident and non-resident attaching creditors.

76 Therefore, under the rule laid down in Greene *v.* Van Buskirk, 7 Wall., 151, we must consider the matter settled. It is there held that the rights of the attaching creditor are not at all affected by the question of citizenship.

In Sheldon *v.* Blanvelt, a case recently decided by the supreme court of South Carolina, reprinted in 7 Southeastern Reporter, 593, the same conclusion is reached. The statute of South Carolina with reference to assignments by insolvent debtors is the same in effect as are the provisions of our own statute, and the facts involved in the case just cited are precisely the same as those presented in the case at bar.

Section 2, article 4, of the Constitution reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

We think that the decision before alluded to in 7 Wall., in which this article is construed as affecting the rights of non-resident citizens in cases similar to this, applies to the facts as they are here presented, and under that decision, as well as under Sheldon *v.* Blanvelt and the authorities therein cited, we must conclude that the non-residence of the attaching creditor in this case could not in any manner prejudice his rights, and that he was entitled to the same privileges that under the same circumstances would be accorded to any citizen of Idaho.

In reaching this conclusion we are following what we conceive to be the rule laid down by the Supreme Court of the United States, and the wisdom of the principle thus enunciated by our highest court is as unquestionable as its authority. When once a citizen has been accepted by any court of the United States as a

77 suitor it does not seem to be in accordance either with the principles of justice or with common fairness or with common honesty between man and man to question him as to the particular State in which he may reside, and then give or refuse him what the courts would deem to be justice if the suitor were a citizen of our own State, but deny him this supreme right if the fact is developed that he is a citizen of another State.

In Atherton *v.* Ives, 20 Fed. Rep., 897, the court follows this doctrine, and concludes a vigorous endorsement of the principle in these words:

"We think such a distinction should not have been drawn by the court unless compelled to do so by legislative will clearly expressed. It may be that the legislature of a State has the power to exercise such a patriarchal and provident sovereignty, but this court will not assume such as the legislative will."

In concluding our discussion of this principle we will say that the pointed declaration just quoted meets with the hearty approval of this court, and in the absence of a positive statutory enactment we do not think the court justified in asking the citizen who seeks the beneficial protection of its laws whence he came with a view of administering the law accordingly.

The principle of comity between States, or to what extent laws governing the transfer of property in one State will be respected by a sister State, is the next question to be considered.

The courts of the country have differed very much on this proposition. Nevertheless, it is conceded by all that one State is not bound to accept the transfer laws of another State affecting property located within its borders. It is useless for us to discuss the
78 question. The rule is laid down for our guidance by the Supreme Court of the United States in Greene *v.* Van Buskirk, 7 Wall., 151. The language of the court is as follows:

"And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives."

In Atherton *v.* Ives, 20 Fed. Rep., 895, '6, the court also endorse this rule.

The only question remaining in this connection is, Was the assignment made by Lipman under the laws of Utah Territory contrary to a clearly expressed statute or to the settled policy of this Territory?

We think it was contrary to both. Commencing with section 5875 the statute designates how an insolvent debtor may proceed in this Territory in proving his insolvency and the necessary steps to be taken to complete the transfer and sale of his property for the benefit of his creditors. Under this act an assignee chosen by the creditors (and let us remark that these creditors may be residents or non-residents) is appointed by the court. The assignee thus appointed must dispose of the property of the insolvent for the benefit of all the creditors, share and share alike, preferences or priority being strictly forbidden. Section 5932 is as follows:

"No assignment of any insolvent debtor otherwise than as provided in this title is legal or binding on creditors."

The assignment made by Lipman was in direct conflict with the provisions of this statute and one of its most important provisions, to wit, that which prohibits preferences.

It was urged by the respondent that if this rule were applied to the case at bar a non-resident of Idaho doing business in the
79 Territory could not make an assignment of property within the jurisdiction of the Territory.

This may be true, but the resident insolvent is not permitted

under this law to prefer any creditor in this Territory over any creditor out of the Territory, and we do not think a non-resident insolvent doing business in Idaho ought to be permitted to make an assignment giving preferences to non-residents of the Territory over residents of the Territory in which he is doing business and the laws of which he invokes to protect his property and maintain for him the same rights and privileges that are extended to any citizen of the Territory. A non-resident being entitled to the same right under our law as a citizen of the Territory may invoke the same principle.

While this point was urged by the respondent, we think it was carried a little too far.

The courts of this Territory would, we believe, respect the assignment of a non-resident doing business in Idaho if made in accordance with its laws; in other words, if Mr. Lipman's assignment had been made for the benefit of all his creditors, share and share alike, we believe, under the principle of comity, it would have been respected, as it would not have been contrary to the laws or the policy of this Territory.

In holding that this assignment was invalid as against attaching creditors we are following the rule already quoted and feel bound so to do, yet we do not hesitate to say that the rule meets with our approval.

Persons doing business with residents of this Territory should know what laws govern the transfer of property. By having
80 one uniform principle, applicable alike to all property situated in this Territory, whether of residents or non-residents, every person doing business within the Territory and every non-resident doing business with persons residing in the Territory may know, before extending credit or locating property within the jurisdiction of our laws, what laws will govern the transfer of that property, whose rights may attach and how they may attach, and it gives to our business community a stability and character that we believe to be not only desirable but almost necessary to free and advantageous commercial intercourse with distant States lying to the east and to the west of us.

Before passing to a consideration of the next principle involved we add the further suggestion that sheriffs and other officers of like character in the Territory have a right to understand whether or not in proceeding under our laws and in accordance therewith they are protected by them. In this case the sheriff proceeded regularly and in accordance with the laws of Idaho, yet he is subjected to a suit for damages because he did not understand and proceed in accordance with the laws of Utah or in pursuance of transactions executed in harmony with those laws, but in direct violation of our own.

Counsel for respondent urged with a great deal of strength and persistency the fact that plaintiff was in possession of the goods at the time of the seizure by defendant under the writ of attachment. It is also averred by counsel for respondent that defendant had

actual notice of the contents of the deed of assignment and the possession thereunder by plaintiff.

This point was urged with a great deal of ability and numerous authorities cited relating, perhaps indirectly, thereto. It does
81 not seem to be a serious question. It is entirely regulated by the statute. If we do not recognize the principle of comity for the reasons before stated we must proceed under our own law. This statute declares in the most positive terms that any assignment made with preferences shall not be binding or legal as against creditors. This being true, of what effect was the possession under and by virtue of an assignment that was clearly invalid? The attaching creditor was under no obligations to respect it. Indeed, the law distinctly declares that it was not valid as to him, and hence the mere fact of his possession under an invalid instrument is not material in this case.

May a person violate the positive mandates of a statute and then claim protection as against the complainant because the latter knew of the former's violation of the law? Nor do we see that the question of a voluntary or an involuntary assignment is entitled to consideration in passing upon the merits of the issues involved. No general assignment can be made in this Territory, voluntary or otherwise, giving preferences. Therefore we do not see that the fact of this assignment having been voluntary on the part of Lipman has any bearing whatever on this case.

We must conclude, therefore, that the court below erred in holding such assignment to be valid as against attaching creditors of the assignor and the possession of the defendant under said writ of attachment to have been unlawful. Let the judgment be reversed and the cause remanded to the lower court with instructions to enter judgment for the def't in accordance herewith.

BEATTY, *C. J.*, concurring:

82 Having been counsel between the same above-named parties in a cause in the same lower court, but with a different attaching creditor, I desire to take no part herein farther than to sit at the hearing. I have not participated with my associates in its discussion, but, they having reached opposite conclusions, the disagreeable duty rests upon me of breaking the dead-lock, which, in following my convictions and what seem- to me the weight of authority, I do by concurring in the able opinion of Mr. Justice Sweet.

STATE OF IDAHO:

Supreme Court.

I, Sol. Hasbrouck, clerk of the supreme court of the State of Idaho (formerly the Territory of Idaho), do hereby certify that the above and foregoing is a full, true, and correct copy of the original opinion in the above-entitled action now of record in my office and of the whole thereof.

Seal Supreme Court, Idaho Territory.

In testimony whereof I have hereunto signed my name and affixed the seal of said supreme court this 23d day of July, A. D. 1890. Done at Boisé City, Idaho.

SOL. HASBROUCK, *Clerk.*

83 In Supreme Court of Idaho, January Term, 1890.

JOSIAH BARNETT, Assignee, Plaintiff and Respondent,
vs.
P. H. KINNEY, Defendant and Appellant.

Angel and Sullivan, attorneys for appellant; Kingsbury & McGowan and C. S. Varian, attorneys for respondent.

BERRY, *J.*, dis-enting:

A part of the subject of the assignment in question was personal property in the Territory of Idaho. The assignor lived at the time of its execution in Utah Territory, where the assignment was made. It was a voluntary assignment in trust for the benefit of creditors, and is conceded to be valid under the laws of Utah Territory. The assignee had gone into possession and was in possession as such assignee when the property was seized and taken from his possession by the sheriff of Alturas county by virtue of a writ of attachment in favor of a creditor of the assignor resid-
84 ing in the State of Minnesota, where the debt was contracted.

The assignee brought replevin against the sheriff, and on the trial in the court below had judgment for the property. This appellant seeks to reverse that judgment.

There is but one controlling question in the case, viz., whether that assignment, valid where it was made, should, under the statutes of this Territory, be held to be operative here.

Under our statute I think it is clearly valid and operative.

The appellant rest- upon section 5932 of the Revised Statutes of Idaho, which provides that "no assignment of any insolvent debtor other than as provided in this title is legal or binding on creditors."

This is the closing section of title XII, page 666, of the Statutes of Idaho. The act is headed "Proceedings in insolvency."

The general scope and apparent purpose of the whole title of fifty-five sections is shown in its first section, 5875, as follows:

"Every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and
85 liabilities." No stronger terms are needed to show that the parties thus to be favored are the citizens of Idaho, and certainly it was not designed to compel all persons contemplating assignment to reside here six months before doing so or to compel into our courts citizens of other States and Territories to get a discharge from their debts through insolvency proceedings. I do not beli-ve that the revisers of our law in 1887 had any design that Idaho should take upon her a task of that magnitude, nor do I think there was any design to preclude parties out of this Territory who might have property in it from making any assignment what-

ever for the benefit of their creditors without going through our courts in insolvency proceedings. Of course, to hold that this act has any extraterritorial scope and meaning is practically to deny to a non-resident the right to make any assignment whatever of his property here for the benefit of creditors.

The statement of the proposition seems to me to carry with it a most forcible denial of any such intent.

86 It is not claimed but that a State or territorial legislature may do so if it desires, but the precedents are that it will not be presumed to have so intended unless its enactments to that effect shall be clear and unequivocal. 57 Mich., 62; 54 N. Y., 29.

In 1860 a statute was enacted in New York entitled "An act to secure to creditors just division of the estates of debtors who convey to assignees for the benefit of creditors."

Such act forbade preferences. It provided how the assignment must be executed, that an inventory should be filed of the property assigned, assignee should give bonds, &c., all substantially as provided in our act, but with a prohibition as to other assignments as strong as our own. An assignment was made by a debtor in Canada valid according to the laws of Canada, but in no way complying with the requirements of the New York statute. Possession in New York had been taken by the assignee; whereupon a New York creditor (not, as in this case, a foreign creditor) attached it, but the

87 court held the act to apply to domestic assignments only and held the foreign assignment good.

Ockerman *et al. vs.* Gross, 54 N. Y., 29; so in Butler *vs.* Wendel, 57 Mich., 62; so in Train *vs.* Kendall, 137 Mass., 366; so also in Brill *vs.* Curtis, 32 Vt., 460; 78 American Decisions, 586.

But we need go, I think, no further than to the internal evidences of the act to be convinced that it was not intended to apply to foreign assignments. In fact, the title provides expressly that the assignor must be a resident of the Territory. The judgment in the court below should be affirmed.

Office of the Clerk of the Supreme Court of Idaho.

BOISÉ CITY, IDAHO.

I, Sol. Hasbrouck, clerk of the supreme court of Idaho, do hereby certify that the foregoing dis-enting opinion is a full, true, and correct copy of the original dis-enting opinion as recorded on pages 428, 429, and 430 of Judgment Book 3 of the supreme court of Idaho.

88 In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Idaho the sixth day of August, A. D. 1890.

Seal Supreme Court, Idaho Territory.

SOL. HASBROUCK, *Clerk*,
By R. E. HALLOCK,
Deputy Clerk.

89 Supreme Court of the United States.

JOSIAH BARNETT, Assignee, Plaintiff,
vs.
P. H. KINNEY, Defendant.

Know all men by these presents that we, J. C. Fox, Alex. Willman, and R. W. Berry and H. R. Plughoff, of Hailey, Idaho, are held and are firmly bound unto Patrick H. Kinney, of Hailey, Territory of Idaho, in the sum of five thousand five hundred ($5,500.00) dollars, to be paid to the said Patrick H. Kinney, his executors and administrators; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 10th day of June, A. D. 1890.

J. C. FOX.
ALEX. WILLMAN.
R. W. BERRY.
H. R. PLUGHOFF.

Whereas the above-named Josiah Barnett, as assignee, appealed to the Supreme Court of the United States from a judgment of the supreme court of the Territory of Idaho to reverse a
90 judgment rendered in the above-entitled action by the said territorial court:

Now, therefore, the condition of this obligation is such that if the above-named Josiah Barnett shall prosecute his said appeal to effect and answer all costs and damages for the detention of the property involved and the delay and interest if he shall fail to make good his said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

J. C. COX. [SEAL.]
ALEX. WILLMAN. [SEAL.]
R. W. BERRY. [SEAL.]
H. R. PLUGHOFF. [SEAL.]

Sealed and delivered in the presence of—
A. J. McGOWAN.

The foregoing bond is hereby approved.

JAMES H. BEATTY,
Chief Justice Sup. Court Idaho Territory.

June 10, 1890.

(Endorsed:) In supreme court. Josiah Barnett, assignee, pl'ff & app'l't, *vs.* P. H. Kinney, def. & respond't. Bond on appeal. Filed June 10th, 1890. Sol. Hasbrouck, clerk.

91 By the Honorable J. H. Beatty, chief justice of the supreme court of Idaho for said district of Idaho to Patrick H. Kinney:

Whereas Josiah Barnett, assignee, has lately appealed to the Su-

preme Court of the United States from a judgment lately rendered in the supreme court of the Territory of Idaho, made in favor of you, the said Patrick H. Kinney, and has filed the security required by law, you are therefore hereby cited and admonished to appear before the said Supreme Court, at the City of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Hailey, in the district of Idaho, on this the 10th day of June, in the year of our Lord one thousand eight hundred and ninety.

JAS. H. BEATTY,
Chief Justice Sup. Court, Idaho.

JOSIAH BARNETT, Assignee, Plaintiff,
vs.
P. H. KINNEY, Defendant.

92 DISTRICT OF IDAHO, *ss:*

Seldon B. Kingsbury, being duly sworn, says that on the 10th day of June, A. D. 1890, at Hailey, Territory of Idaho, he served upon the above-named appellee, Patrick H. Kinney, a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court of the Territory of Idaho by delivering said copy of the citation to the said appellee personally and by leaving said copy of the appeal in the clerk's office of the supreme court of the Territory of Idaho.

SELDON B. KINGSBURY.

Subscribed and sworn to before me this 13th day of June, A. D. 1890.

SOL. HASBROUCK,
Clerk Supreme Court.

(Endorsed:) In supreme court. Josiah Barnett, assignee, pl'ff & app'l't, *vs.* P. H. Kinney, def't & resp't. Citation on appeal to Sup. Court U. S. Filed June 10th, 1890. Sol. Hasbrouck, clerk.

93 Office of clerk of the supreme court of Idaho.

BOISÉ CITY, IDAHO.

I, Sol. Hasbrouck, clerk of the supreme court of Idaho, do hereby certify that the foregoing citation on appeal to the Supreme Court of the United States and the bond on appeal are full, true, and correct copies of the originals now remaining on file in my office.

Seal Supreme Court, Idaho Territory.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Idaho the fourth day of August, A. D. 1890.

SOL. HASBROUCK, *Clerk,*
By R. E. HALLOCK,
Deputy Clerk.

94 *Assignment of Errors.*

The appellant respectfully assigns as error in the proceedings of the supreme court of Idaho, as set forth in the foregoing and annexed transcript, the ruling and decision of that court in refusing to give effect to the assignment of the insolvent debtor in Utah as against the claim and attachment of the Minnesota creditor, and specially herein because it sufficiently appears that the said assignment was valid by the law of Utah where executed, and that the assignee thereunder took full and complete possession of the stock of goods in question, situated in Idaho Territory, before the levy of any attachment by the said foreign creditor, and because the said insolvent law of Idaho was intended solely for the regulation of the domestic concerns of that Territory and its citizens and did not make void any foreign voluntary assignment which was valid by the law of the place where made, and the said appellant prays the consideration of said assignment by the court here that justice may be done in the premises.

Respectfully,

C. S. VARIAN,
Attorney for Appellant.

Endorsed on cover: Case No. 14,130. Idaho Territory supreme court. No. 764. Josiah Barnett, as assignee, appellant, *vs.* Patrick H. Kinney. Filed September 3, 1890.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

JOSIAH BARNETT, APPELLANT,

vs.

PATRICK H. KINNEY, APPELLEE.

No. 764.

MOTION TO DISMISS OR AFFIRM.

And now comes the appellee and moves the court to dismiss the writ of error in this cause, for want of jurisdiction, because the value of the matter in dispute does not exceed five thousand dollars; or if the appeal shall not be dismissed, that the judgment of the Supreme Court of the Territory of Idaho be affirmed, on the ground that although, in the opinion of this court, the record may show that this court has jurisdiction, it is manifest that said appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

WM. STONE ABERT and
JOHN W. WARNER,
For Appellee.

JAN 8 1892
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

JOSIAH BARNETT, ASSIGNEE,
v.
PATRICK H. KINNEY.
No. 764.

Defendant in error has made a motion to dismiss this writ upon the ground that the matter in dispute does not exceed five thousand dollars, or to affirm on the ground that the writ of error is taken for delay only.

First, as to the motion to dismiss for want of jurisdiction. The matter in dispute was a stock of goods replevined by the plaintiff in error, an assignee under a voluntary assignment, from the defendant in error, the sheriff of Alturas county, Idaho. The value of this stock of goods, therefore, was the matter in dispute.

In the eleventh finding made by the trial court, page 23 of the transcript, it is stated that the whole value of the goods situate in Idaho and under attachment, and replevined in both actions aforesaid, was about five thousand dollars. This finding is based upon a stipulation entered into by the parties in the trial court, found on page 12 of the transcript, in the same words. This stipulation, and

the finding based thereon, would seem to justify the motion to dismiss; but by a certified copy of the original stipulation now on file in this Court, as well as by affidavits of Charles S. Varian, one of the attorneys for the plaintiff in the court below, and of Josiah Barnett, the plaintiff himself, it appears that in this eleventh stipulation and finding, as found in the transcript, the word "about" is by a clerical mistake substituted for the word "above;" that the stipulation as originally made, and the finding which was intended to be in the exact words of the stipulation, ought to read, that "The whole value of the goods situate in Idaho, and replevined in both actions aforesaid, was *above* five thousand dollars," instead of "about" five thousand dollars. In other words, by a mere clerical error resulting in the use of the word "about" instead of "above," in copying the stipulation and finding, it is claimed by defendant that this appeal is to be defeated. We cannot believe this Court will so hold. This Court has repeatedly decided that this matter of the ascertainment of values in this Court, for the purposes of jurisdiction, is open to proof by affidavit or otherwise. (Gage *v.* Pumpelly, 108 U. S. 164; Zeigler *v.* Hopkins, 117 U. S. 683–689; Wilson *v.* Blair, 119 U. S. 387; Talkington *v.* Dumbleton, 123 U. S. 745.) We do not contradict the finding, even if there were no mistake. "About" may as well mean "over" as "under," or "exactly," five thousand dollars.

Surely, with the certified copy of this finding, fortified by two affidavits showing the mistake, the jurisdiction of this Court is clearly established.

If it be objected that the claim of the defendant in error, under which he attached these goods, was less than five thousand dollars, the answer is plain. The matter in dispute, so far as the plaintiff in error is concerned, is not

the amount of the claim of either attaching creditor, but the value of the goods levied on by both attaching creditors. Plaintiff in error, as the holder of the legal title, claims all of this property under the assignment. He brings his action at law in replevin for these goods, or their value, and the total value of the goods is the matter in dispute. What may be the claim of any particular creditor of plaintiff's assignor is wholly immaterial. Any one of these claims, or all of them, may be much greater or much less than the value of the goods, but that fact does not affect the matter in dispute in the replevin case. If the goods were of the value of only three thousand dollars, the fact that any claim might be over five thousand dollars would not increase the matter in dispute, and the converse is equally true. The matter in dispute is fixed and unvarying, being the value of the goods replevined.

Second, as to the motion to affirm, little need be said. The question was decided in favor of the plaintiff in the trial court. It was reversed in the supreme court of the Territory. The question is one of importance, of delicacy and of difficulty, and it is not believed that any argument is necessary to induce the Court to give the case the usual hearing and a careful consideration.

W. H. H. MILLER,
Attorney for Plaintiff.

JAN. 6, '92.

II.

An assignment for the benefit of creditors made by a non-resident of Idaho, in accordance with the laws of his domicile, and providing for preferences, is invalid as to property situate in Idaho, as against attaching creditors under the provisions of the Revised Statutes of Idaho, Secs. 5875, 5932.

Barnett *vs.* Kinney, 23 Pacific Reporter, 922.

The Statutes of Idaho will not permit such an assignment to be made by residents or non-residents; all are alike placed upon an equality.

Green *vs.* Van Buskirk, 7 Wallace Rep., 151.

The law of Idaho formed a part of the contract under which the assignor, Lipman, obtained credit, and he was indisputably presumed to have contracted and obtained credit with the knowledge that if he became insolvent, and desired to make an assignment for the benefit of his creditors, he would not be permitted to make any preferences, but all of his creditors would have an equal right to share *pro rata* in the distribution of the insolvent estate.

As this assignment was void, as to creditors in Idaho, the fact that the assignee took possession of the property by virtue of such assignment does not validate it as against the creditors of the assignor.

WM. STONE ABERT and
JOHN W. WARNER,
Attorneys for Appellee.

THE LAW REPORTER PRINT

IN THE

Supreme Court of the United States.

October Term 1892.

Term No. 415.

JOSIAH BARNETT, *Assignee*,

vs.

PATRICK H. KINNEY.

APPEAL FROM THE SUPREME COURT OF IDAHO.

BRIEF FOR APPELLANT.

Lipman, a resident of Salt Lake, Utah, owning property, real and personal, in that Territory, also owned a stock of merchandise in Idaho. Being in embarrassed circumstances, he made a common law sale or assignment of all his property subject to execution, including that in Idaho, to Barnett in trust for the payment of his debts.

This assignment provided for certain preferences, but is conceded to have been lawful at Common law and valid in Utah, which territory has no statute regulating such assignments. Indeed the court distinctly finds that this assignment was valid under Utah law. (Record p. 22, 6th Finding.)

Under this assignment, Barnett took possession of all

the property, including that in Idaho, and was proceeding with the administration of the trust.

While the Idaho property was thus in Barnett's possession, a Minnesota creditor of Lipman, The St. Paul Knitting Company, sued out in the District Court of Idaho, a writ of attachment against Lipman, under which writ the proper sheriff, Kinney, seized the Idaho merchandise, as the property of Lipman.

Thereupon Barnett, assignee, replevined said property from Kinney, sheriff, thus originating the case at bar.

The territory of Idaho, at the time of these proceedings, had a general insolvent law, (practically a bankrupt law so far as it was competent for the territorial legislature to enact such law,) the last paragraph of which (being Section 5932 R. S. of Idaho) reads as follows:

"No assignment of any insolvent debtor, otherwise than as provided by this title, is legal or binding on creditors."

The District Court held that this provision had no application to assignments made by non-residents of Idaho and gave judgment for the assignee.

Two out of three of the Judges of the Supreme Court, taking a different view, reversed that decision and the assignee prosecutes this appeal, or writ of error.

The opinions of the judges are in the record and we submit the opinion of Associate Justice Berry, supporting the decision of Weir, Chief Justice, who tried the case in the District Court, is correct.

Certainly the opinion of Judge Beatty, who succeeded Weir as Chief Justice, under the circumstances detailed in his own statement, is not entitled to any consideration.

Assignment of Error.

1. The Supreme Court of Idaho erred in holding that, on the facts found, said assignment was valid.

2. The Supreme Court of Idaho erred in reversing the decision of the District Court.

I.

Nothing is better settled than that, ordinarily a transfer of personal property, valid at the place of the owners domicile, especially if the contract is made there, is valid everywhere.

In Black vs. Zacharie, 3 How. p. 514. this court, by Mr. Juctice Story said:

"It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary."

The only qualification of this rule, so far as known, is that in some states, as in Louisiana, it is necessary that the contract of transfer shall be consumated by delivery; Wharton's Conflict of Laws, Sec. 335-337; Cole vs. Cunningham, 133 United States, p. 129.

The same general rule is applied to all contracts in reference to personal property and personal obligation; as for instance a Contract of Affreightment; Liverpool, &c. vs. Phoenix, &c., 129 U. S. p. 464; or a contract for interest; Miller vs. Tiffany, 1 Wall. p. 298; or as to the acceptance of a Bill of Exchange, Scudder vs. Union National Bank, 91 U. S. p. 411.

But this proposition is so well settled and is of such general application that further discussion or citation of authorities is quite superfluous.

II.

We maintain that no statute or policy of Idaho, contrary to this general rule, is shown. Title 12 of the Revised Statutes of that State, consisting of Sections 5875 to 5932 inclusive, provides for a general system of insolvency by proceedings in court very closely approximating, in many respects the federal bankrupt law of 1867.

As is well-said by Judge Berry in his opinion in this case, the very first section, No. 5875, showing the general scope of the law, makes it clear that it applies only to domestic insolvents:

"Every insolvent debtor may, upon compliance with the provisions of this Title, be discharged from his debts and liabilities."

Is such ignorance of the law to be imputed to the Legislature of Idaho, as to suppose they believed this section would have any validity except as to domestic insolvents?

It must be presumed that this statute was enacted with a full understanding of the Federal Constitution, on this subject, as expounded in Ogden vs. Sanders, 12 Wheaton, p. 213, and subsequent cases upon the same subject. This being so it was, of course, known that the laws of Idaho could not discharge an insolvent debtor, resident in another jurisdiction.

2. But we are not left to such inferences as to the purpose to limit this Act to domestic insolvents. The second section, No. 5876, provides that:

"Any insolvent debtor, owing debts exceeding the amount of Three hundred Dollars, may apply by petition to the District Court of the County, *in which he has resided for six months* next preceeding the filing of his petition, to be discharged from his debts and liabilities."

The remainder of the section and the next section provide what must be set forth in his petition, schedules, &c, and for the adjudication of his insolvency.

The next section, No. 5878, requires a description of all his estate, including the homestead, if any, "*and all property exempt, by law, from execution*," &c.

If this law applies to a non-resident debtor, in what District Court is he to file his petition?

He has not resided in any district in Idaho six months or any other time.

Again, why, if it applies to a non-resident, is anything said in reference to the "homestead" or "property exempt from execution?"

A non-resident can have no homestead in Idaho, and it is unheard of that any property of a non-resident is exempt from execution; yet, in section 5880, property exempt from execution is expressly excepted from the seizure to be made by the sheriff.

By section 5902, the Act is made to apply to partnerships, and by the last paragraph of that section, it is provided that if the partners reside in different counties, that court in which the petition is first filed, may retain exclusive jurisdiction over the case.

By section 5903, the law is made to apply to corporations.

Is it to be supposed that the Legislature of Idaho was assuming to prescribe a system of insolvency for the corporations of New York and Pennsylvania, and fix the terms on which such corporations could be discharged from liability?

The judicial history of this country is not without illustration of the evil effects of legislation in one jurisdiction in disregard of the general principles and comity which ought to prevail amongst all the states and territories.

From time to time the legislatures of various states have seen fit to open the doors of their courts to applicants for divorces from other states, without regard to residence or upon the proof of the slightest pretense of residence.

The result has been disgraceful conflicts of decision in the courts, and a stigma upon the good name of every state where such legislation has prevailed.

The attempt to make this insolvency legislation of the territory of Idaho, which properly construed is purely local, of such general application as required by the decision under consideration, would lead to like confusion and conflict of decision.

Practically, the affect of this decision is that personal property situate in Idaho cannot be applied by a citizen of another state or territory, to the payment of his debts unless he will come into the territory, acquire a residence of six months duration and then go through the Court of Insolvency, under this statute. If this be the proper rule to be enforced in Idaho, it is not less proper to be enforced in all the other 43 states and the territories; and the result must be that a merchant living in one of the great cities, having assets in the way of credits or other property in a dozen different states, and being unable to pay in full all his creditors, must have his estate administered and distributed according to the laws of such different jurisdictions with such preferences, just or unjust, as may result from a race of diligence.

It is not questioned that, by express legislation, the Legislatures of the various states may make such practices necessary. It *is* questioned that any court, widely surveying the whole business landscape, will make such practices necessary by construction, or by inter-

pretation except as expressly required by the letter of the law.

III.

That such a statute as this applies only to domestic insolvents is also well established by authority.

It is to be noted, first, that this is not a statutory but a common law assignment,—a voluntary sale and transfer of property by the owner for the payment of his debts, preferring some, as he had a right to do; Fitzpatrick vs. Flanagan, 160 U. S. p. 848; Jewel vs. Knight, 123 U. S. p. 426; Smith vs. Craft, 123 U. S. p. 436. Indeed it is found as a fact, in the Record (p. 22) that the assignment was valid under the laws of Utah.

Another fact to be noted, a fact of the utmost significance, and which discriminated this case from those relied on by Defendant in Error, is the circumstance that the assignment was consummated by an actual delivery of the property, to the assignee before the inception of the attachment proceeding. That the cases cited in the majority opinion of Judge Sweet, are subject to this discrimination will be hereafter shown.

In this case then we have;

1. A common law voluntary assignment.

2. That assignment is consummated by delivery of the property before attachment commenced.

3. The attaching creditor is not a resident or citizen of Idaho but of a foreign state.

In such case what say the authorities as to whether the local statute of insolvency is operative to annul such assignment?

Halstead vs. Straus, 32 Federal Reporter, p. 279, is directly in point. This was a contest between attachment creditors of Halstead, Haines & Co., of New York, on the one side and the voluntary assignee of said firm on the other; the property in dispute being the

indebtedness of one Straus, a resident of New Jersey, to said firm. The suit was in the United States Circuit Court for New Jersey. Mr. Justice Bradley in deciding the case says:

"It is true that the statute of New Jersey declares that assignments in trust, for the benefit of creditors, shall be for their equal benefit in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments and not to those made in other states which affect creditors or property in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment, made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. Bentley vs Wittemore, 19 N. J. Eq. 462; Moore vs. Bonnell, 31 N. J. Law, 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering & Co., were a New Jersey firm, they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts in carrying out the policy of its statute for the protection of its citizens, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for."

The same doctrine is stated in the Receiver vs. The First National Bank, 34 N. J. Eq. 450, where it was held:

"That where a transfer of property is valid by the *Lex Loci*, no just rule of comity requires the courts of the state where the property happens to be located to adjudge such transfer to be invalid at the instance of citizens of other states, simply on the ground that it is incompatible with its laws.

May vs. First National Bank, 122 Illinois, 551, is also directly in point. This was another case growing out of the assignment of Halstead, Haines & Co., of New York. The contest was between the New York assignee and a subsequent attaching creditor of Massachusetts. It was held, citing and following Bentley vs. Wittemore, 19 N. J., 462, that a voluntary assignment in New York, with preferences, although the statute of Illinois forbade preferences, would be upheld as against everybody except creditors resident in Illinois.

Butler vs. Wendell, 57 Mich., 63, is also direct authority upon two points:

1. That the statute of Idaho in question applies only to domestic assignments.

2. That New York, common law assignments will be enforced. The provision of the Michigan law, section 8739, relied upon to defeat this assignment, was much more directly at variance therewith than is the Idaho statute in the case at bar.

The Supreme Court of Michigan says:

"Upon the face of the instrument it appears to be an ordinary Common law assignment for the benefit of creditors, with preferences, and does not appear to be executed under or in pursuance of any statute. Being valid in the State where made, it must be considered valid here, unless opposed to some positive enactment or the policy of the laws of this State. It is claimed that it is opposed to How. Stat. 8739, which declares that all assignments commonly called Common law

assignments for the benefit of creditors, shall be void unless the same shall be without preferences as between such creditors, and unless the instrument or a copy thereof, an inventory of the assigned property, a list of the creditors of the assignor, and a bond for the faithful performance of the trust by the assignee, shall be filed in the office of the Circuit Court of the county where the assigned property is principally located? This section of the law has no extra-territorial force. It was intended to affect such assignments as are made in this State, and was not intended to affect assignments made in other States by the citizens thereof."

The same doctrine is maintained in Massachusetts; Train vs. Kendall, 137 Mass., 365; May vs. Wannamacher, 111 Mass., 202.

So in Egbert vs. Baker, 58 Conn., 319, it is held that a common law assignment, made by a debtor in another State, good by the laws of that State, will convey to the assignee, debts due to the assignor from persons residing in Connecticut, and that, notwithstanding the assignment is with preferences, which would be invalid under the laws of Connecticut;

That court says:

"By giving effect to a Common law conveyance made by the party, we do not import into this State the local statute of another State, but simply give effect to a principle of law of general application in all the States, as we believe; in this State as well as New York. The principle is too firmly established and too important to be departed from or shaken. A departure by one State even would introduce great confusion and seriously affect the commercial interests of the country.

"But we are asked to make an exception to the rule on the ground that the assignment giving a preference

to creditors contravenes the policy of our insolvent law, which forbids preferences and seeks to divide the assets ratably among creditors. In a legal sense it cannot be said that a contract made in the State of New York, in strict conformity to the laws of that State, and by citizens of that or other States, contravenes the policy of our law. Our statute was not enacted for such contracts and takes no cognizance of them. Such contracts may dispose of property in a manner not allowed by our law; but that does not concern us; and is certainly not a sufficient reason for giving our statute an extra-territorial jurisdiction, especially in a case between citizens of other States, the effect of which would be to deprive parties of vested rights.

This contract affects neither citizens of this State, nor property in this State. The garnashees have no interest in this question, and, for the purposes of this case, the debts owing by them have no situs in this State. Comity, certainly does not require us to avoid this contract, for it is not a case for the application of that principle."

Sanderson vs. Bradford, 10 New Hamp., 260, also directly supports this assignment.

The assignment in that case was made in Massachusetts and was with preferences which were not allowed by the statute of New Hampshire. It was held:

1. That the New Hampshire statute forbiding preferences applied only to New Hampshire assignments.

2. That as against foreign creditors, no rule of comity or law forbids the recognition of the validity of such assignment.

What might be the effect as to the New Hampshire creditors is not decided.

Ockerman vs. Cross, 54 N. Y. p. 29, still more clearly supports our position.

The assignment under consideration in that case was made in Canada. The contest was between the assignee and attaching creditors in New York. It was insisted that the assignment was in contravention of the statute of New York with reference to insolvents. By a detailed examination of the New York law it is made to appear by just such provisions as to residence as those contained in the Idaho law, that is fixing the venue of the proceedings, the place where the assignment is to be recorded, etc., as the place of the residence of the debtor, that the law was intended to apply only to domestic insolvents. Thereupon the court says:

"These details of the Act clearly indicate that it was only intended to apply to assignments of a debtor or debtors residing in this State. It has consequently no application to the case in question."

The Supreme Court of Missouri, in *Thurston*, et al. 6. *Rosenfeld*, et al. 42 Mo. held that an assignment made in New York with preferences confessedly forbidden by the Missouri statute was valid. "The statute refers to assignments made in this State," said the court. It is true that no lien had attached and no Missouri creditors appeared, and the court went on to express by way of dictum its views of what the law would have been if other circumstances were involved. The case is cited, however, to sustain this principle for the appellant herein, viz. that such statutes governing insolvency are intended to operate only on assignments made within the State or Territory.

In Weider vs. Maddox et al. 66 Tex., 372, it was held that an assignment in Missouri passed title to property in Texas notwithstanding levies of attachment, and notwithstanding the non-compliance with certain formal provisions of the Texas statute. The court in their opinion said: "So far as we are advised, it has

been generally held in cases of voluntary assignments, made by non-resident debtors, embracing property in a State or States other than that of the domicile, that the assignment will be deemed valid, if it be sufficient, under the law of the domicile, and under the law of the country in which the property is situated, to pass title; notwithstanding the law of the *situs*, intended to regulate the due administration of trust property be not complied with; that such laws are only intended to affect and only do affect, assignments made by persons resident in the State in which they exist."

Speed vs. May, (17 Pa. St. 91) was a contest in the Courts of Pennsylvania between the voluntary assignee for the benefit of creditors under an assignment made in the State of Maryland and attaching creditors. The residence of those attaching creditors does not appear, but presumably they were resident in Pennsylvania, the contrary not being stated. It was held that the assignee had the better title, and that the Pennsylvania law to which the assignment did not conform, had no application, since it was made under the Maryland law.

In Maine, a case exactly similar to that at bar was decided on the principle for which this appellant contends; I refer to Chafee vs. 4th Nat. Bank of New York, 71 Me., 514; 36 Am. Rep., 345.

In that case an assignment had been made under the Rhode Island laws, valid there, but providing for the payment of only such creditors as should extend the time of payment three years; this being at variance with the Maine Statute, which provides that all assignments shall distribute the property ratably among all creditors, and being, of course, not exactly in accordance with the Maine forms. The bank extended the time but not receiving payment in three years, attached real estate in Maine. The assignee, Chafee, brought

bill against the bank to enjoin it from prosecuting the action. The court ruled, in a carefully considered opinion, delivered in 1880, and in the light of most of the modern cases, that the assignment passed title and enjoined the bank.

Judge Walton, who delivered the opinion of the court, considered the direct point at issue here and said with regard to it:

"The ground is taken in defense that all assignments for the benefit of creditors, whether made within or without this state, which are not conformable to our statute, are repugnant to it and therefore to be regarded as inoperative and void so far as property within this state is concerned.

We think this is untenable ground. Our statute does not apply to foreign assignments, it applies only to domestic assignments, leaving the former to be governed by those principles of comity which have heretofore been recognized as existing in this state, and ought to prevail in all the states of the American Union.

Even if the objection is well founded we think it the better rule to abolish the distinction in favor of our own citizens."

The court then considers the question of the estoppel of the bank after acquiescence in assignee's title and rules thus:

"We do not deny that the *Lex Loci rei sitae* is to govern in this case, but we hold that the *Lex Loci rei*, etc., is as here declared. Not that such is the law of this State applicable to domestic assigments, but that such is the law of this State governing foreign assignments when they are brought into litigation here in respect to property here situated. Our statute, as its provisions clearly show, applies only to domestic assignments

No statute can have an extra-territorial force. Our statute cannot govern assignments made in other jurisdictions. The latter, when brought into litigation here must be governed by the rules of comity already referred to."

What gives a special point to the decision of the judge, is that the Maine statute itself presents that matter only by inference, and inference no more direct then in the Idaho statute.

Such being the general current of decisions in the State Courts, let us see how the question stands in the Federal Courts.

Attention has already been called to the decision of Mr. Justice Bradley in Halstead vs. Stevens (32d Federal Reporter 279), directly supporting this kind of an assignment.

As to Green vs. Van Buskirk (7th Wallace, 139) which, in the opinion of Judge Sweet, was assumed to be controlling in this case, it is respectfully submitted that Judge Sweet was in error. The facts in that case were that Bates, a resident of Troy, New York, owning certain iron safes in Chicago, executed in New York, to Van Buskirk and others a chattel mortgage on the safes. Two days later Green, also a resident of New York, and a creditor of Bates, without notice of the mortgage, sued out, in Illinois, a writ of attachment against Bates and caused the seizure of the safes, under said writ, as the property of Bates. At the time of this seizure the mortgage had not been recorded in Illinois, nor had the property been delivered to the mortgagee. By the statute of Illinois, the mortgage of personal property was void, as against third persons, unless acknowledged and recorded and unless the property be delivered to and remain with the mortgagee. The attachment creditor, Green, having received the

proceeds of the attached property, the mortgagee, Van Buskirk sued him in New York for such proceeds. The New York courts, disregarding the Illinois judgment held that the mortgagee had the better right and therefore was entitled to recover. This Court held otherwise upon the ground:

1. That the judgment of the Illinois court, under the Constitution, must have full effect in New York.

2. It was competent for the legislature of Illinois to regulate the transfer of personal property in Illinois by mortgage, and the laws of Illinois making a mortgage unrecorded and unaccompanied by the delivery of the property void must be upheld.

The case is distinguishable from the case at bar in two most important particulars. First, so far as appears from the decision, the Illinois statute there drawn in question had reference to a particular form of contract for a lien on specific property therein described, situate in Illinois, and is equally applicable to the property of a non-resident as to that of a resident.

The law of Illinois in relation to chattel mortgages, as well as to conditional sales, is peculiar; so peculiar that with reference to conditional sales this Court, in Harkness vs. Russell, (118 U. S. 680) says that it is contrary to the great weight of authority in this country, as well as in England. At any rate, the Supreme Court of Illinois, as we have before seen in the case of May vs. First National Bank, (122 Ill. 551) has applied a different rule to an assignment for the benefit of creditors.

Again in the Van Buskirk case the contract of transfer had not been consummated by delivery, as in the case at bar it had. If the possession of the safes had been delivered to Van Buskirk it would doubtless have been held that his title was good as pledgee, though not

good as mortgagee. In other words, that his common law contract was good, though his statutory mortgage was bad.

The difference then between Green vs. Van Buskirk, and the case at bar is this: In the former case the question was whether an attachment duly fastened upon property with the sheriff in possession, is to be upset by an unrecorded mortgage, the statute requiring such record, in favor of a mortgagee not in possession. In this case the question is whether an assignee under a common law assignment, valid where made, is to be ousted from his possession by a subsequent attachment.

One of the two other cases cited by Judge Sweet is Atherton vs. Ives, (20 Federal Reporter, 894). We submit that the decision by Judge Barr does not support the opinion of Judge Sweet. The contest was between the assignee under an assignment made in New York with preferences, and an attaching creditor in Kentucky, where the property was situated. It is held that the assignment being valid in New York, would be respected in Kentucky in the absence of a statute or a settled policy directly forbidding it, and that there was no such statute or policy.

The only other case cited in the opinion of Judge Sweet is Ex Parte Dickinson (Sheldon vs. Blauvelt) 29 S. C. 453. We submit this decision is against the great current of authority and its reasoning does not commend it. Such a decision makes comity among the states simply impossible, and the settlement of the estate of an insolvent a scramble for preferences.

Egbert vs. Baker, 58 Conn., 319.

The case of Caskie vs. Webster, 2 Wall Jr. p. 131 rose on an assignment made by Martin of Virginia to Caskie, of the same state, for the benefit of such creditors as should assent to certain terms, such an assignment

being valid by the laws of Virginia but not allowed by the laws of Pennsylvania. Webster, a Pennsylvania creditor who refused to assent, attached, in the Circuit Court of the United States for Pennsylvania, a debt owed by a citizen of that state to the assignor. Justice Grier decided that the debt passed to the assignee as against the attachment, even "assuming such an assignment as Martin made to be void, if it had been made in Pennsylvania, which however the Court thought it was not". This is the language of the reporter in his statement; in the body of the opinion Justice Grier says: "Sitting here as a Court of the United States, we do not think that the different states of this Union are to be regarded as a general thing in the relation of states foreign to each other. Especially ought they not to be so regarded, in regard to questions relating to the commerce of the country, which is co-extensive with our whole land, and belongs, not to the states, but to the Union."

In Dundas *et al*, vs. Bowler *et al*, 3 McLean, 377 among other matters the question arose as to the effect of a general assignment, made in Pennsylvania, on a note made in Ohio secured by mortgage on realty in that state. The suit was brought by the assignees to foreclose the mortgage. The Pennsylvania assignment gave preferences which the Ohio statute relative to insolvency forbade, and this was made a matter of defense. In deciding that the title to the note passed to the assignee, the Court, after quoting the Ohio statute which provided that "all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others shall be held to enure to the benefit of all the creditors," said:

"How this law can affect an assignment made in

Pennsylvania I cannot perceive. * * * No law can have an extra-territorial operation."

The opinion of this Court upon the question at issue here is pretty fully set forth in the opinion of the Chief Justice in Cole vs. Cunningham (133 U. S. 107). After quoting from Green vs. Van Buskirk (5th Wallace) the Chief Justice says:

"Great contrariety of state decisions exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the law of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter: Again, although, in some of the states, the fact that the assignee claims under a decree of a Court, or by virtue of the law of the State of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial; yet in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyence, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be held valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

Again, in Reynolds vs. Adden, 136 U. S., 348, the same question came under review in a contest between an assignee under the insolvent laws of Massachusetts

and an attaching creditor, as to property situate in Louisiana. The assignee had not obtained possession, and it was held, that until such possession was taken by the assignee, the attaching creditor would prevail over the statutory assignment.

The implication is strong that if possession had been taken, or if it had been a common law assignment the rule would have been different.

Without further argument or citation it is clear on principle and authority:

First. The Idaho statute was not intended to apply to non-resident insolvents.

Second. The case is distinguished from those relied upon by appellee or defendant in error:

1. In that the assignment is a common law contract.

2. In that the assignee was in possession before the attachment issued.

3. In that the attaching creditor, being a non-resident of Idaho, was not entitled to claim any special benefit under the statute of that territory.

With confidence it is submitted that no case can be found where all these circumstances, namely, the common law contract, the actual possession, and the non-resident attachment claimants were in favor of the assignee and yet the assignment held invalid.

Even in the South Carolina case it does not appear that the assignee was in possession.

In conclusion it is hardly necessary to say, that if the insolvent law of Idaho does not apply, then clearly there was no "settled policy" of the territory against upholding this assignment.

Nothing looking in that direction is shown outside of this case; and in this record it appears that two judges, entirely disinterested (Weir Chief Justice in the

District and Berry in the Supreme Court,) hold the assignment valid, while only one judge, without interest, takes the opposite view.

The decision of the Supreme Court should be reversed.

W. H. H. MILLER,
Attorney for Appellant.

with two or more sureties for the return of the property if judgment go against him, the Plaintiff may obtain the possession of the property.

Such a proceeding was had in this case as appears in the record.

First. By the 11th finding of the Court. (Record p. 7.)

Second. By the 11th clause of the agreement of the parties. (Rec. p. 12.) When Kinney, Sheriff, levied this attachment, the property was already held by Barnett, assignee, under the replevin bond.

That property so seized and delivered to one of the parties under such a bond, is in the custody of the law and therefore not subject to levy, is well settled. This must be so on principle, otherwise, the property of a party might be taken away from him to satisfy a seizure, and he and his sureties be required to pay its full value to liquidate the demands of another seizure.

Moreover, to subject property, thus in *Custodia Legis* to such successive seizure would result in endless confusion and conflict of decision and jurisdiction.

But the authorities are conclusive on this question.

Drake on attachment, 7th Ed., Secs. 251, 267 and 331, and authorities cited. Hagan vs. Lucas, 10 Peters, 400.

McKenney vs. Purcell, 28 Kansas, 446; this was a

decision by Judge Brewer in a case very like this. It was held that property held under a replevin bond was in the custody of the law.

To the same effect is Powell vs. Rankin, 80 Ala., 316.

Thompson vs. Marsh, 14 Mass., 268.

So in Roberts vs. Dunn, 71 Ill., 46. Where property had been attached and a forthcoming bond given, it was held that the property was in the custody of the law and not subject to levy.

To the same effect is Kane vs. Pilcher, 7 B. Munroe, 651.

A like decision was made in reference to property taken under a writ of replevin in Acker vs. White, 25 Wendell, 614.

Sellick vs. Phelps, 11 Wis., 380 was upon facts almost identical with those in this case, and the Court held the property not subject to the second levy.

Upon this ground therefore the decision of the Supreme Court of Idaho should be reversed.

W. H. H. MILLER,

Attorney for Appellant.

October Term, 1903.

Term No. 413.

JAMES KINNEY, as assignee, Appellant,

vs.

PATRICK H. KINNEY,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

BRIEF FOR APPELLANT.

[redacted]
JOHN [redacted]
Counsel for Appellant.

Supreme Court of the U. S.

OCTOBER TERM, 1892.

TERM NO. 415.

JOSIAH BARNETT, as assignee, Appellant,

vs.

PATRICK H. KINNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

BRIEF FOR APPELLEE.

Patrick H. Kinney, the appellee, as sheriff of Alturas County, Territory of Idaho, on the 26th of November, 1887, levied an attachment upon certain personalty as the property of M. H. Lipman, at the suit of the St. Paul Knitting Works, a Minnesota corporation.

The attachment was grounded upon the non-residence of Lipman, who was a resident of Salt Lake, in Utah.

At the time of the levy the property was in the possession of Josiah Barnett, claiming as assignee of Lipman under a deed of assignment executed in Utah.

Before the taking of said property by the sheriff, Kinney, Barnett, the assignee, filed said deed of assignment for record in the office of the register of deeds for said Alturas County, Idaho.

Afterwards the said personalty was replevied by the assignee who sold the same, and of the proceeds he now holds the sum of four thousand ($4,000) dollars, subject to the final determination of this cause. (See record p. 6—10th.)

By the deed of assignment for the benefit of his creditors, the insolvent Lipman made *preferences*, and directed that certain of his creditors should be paid in full (record p. 17 [43]).

It is immaterial, whether the assignor is a resident of Idaho, or a non-resident, the title to property in Idaho cannot pass under an assignment for the benefit of creditors which contains preferences.

The statute law of Idaho declared how insolvent debtors may transfer their property for the benefit of creditors; and directs that the property of the insolvent must be disposed of for the benefit of all the creditors, share and share alike, preferences or priority being strictly forbidden; other assignments being void.

Title XII of the Revised Statutes of Idaho (p. 666), entitled "Of Proceedings in Insolvency," contains the law of the Territory in force at the time of Lipman's assignment, relating to assignments of insolvent debtors, and regulates the whole subject.

Section 5932, page 677, of this statute, reads as follows:

"No assignment of any insolvent debtor otherwise than as provided in this title is *legal* or binding on creditors."

The assignment made by Lipman was in direct conflict with the most important provisions of this statute, viz., that which prohibits preferences (*vide* Sec. 5898, page 671, Revised Statutes of Idaho), therefore, so far as the Territory of Idaho

is concerned, this Utah assignment is void and inoperative to pass title to property within the Territory of Idaho.

96 New York Rep., 248; Warner *vs.* Jaffray.
69 Maryland Reps., 329; Brown *vs.* Smart.
29 South Carolina Rep., 461; *ex parte* Dickinson.
37 Georgia Rep., 262; Mason *vs.* Stricker.
44 Connecticut Rep., 196; Paine *vs.* Lester.
129 Massachusetts Rep., 314; Pierce *vs.* O'Brien.
1 Gray Rep., 243; Zipcey *vs.* Thompson.
70 Iowa Rep., 208; Moore *vs.* Church.

So long as there is no national bankrupt act, each State and Territory has full authority to pass insolvent laws binding persons and property within their respective territorial jurisdictions, provided the obligations of existing contracts are not thereby impaired.

The provision of such an insolvent law, that all such conveyances by way of preference of any property within its borders shall be illegal, is a usual and valid exercise of legislative power over property within its territorial jurisdiction and is equally applicable to all such conveyances made after the passage of the law, whether to its own citizens or to the citizens of other States. (Pullman Car Co. *vs.* Pennsylvania, 141 U. S. Reps., 22.)

Judge Story, in his work on Conflict of Laws, Sec. 260, states:

"In England and America, the rule seems firmly established that the law *rei sitæ*, and not that of the place of the contract, is to prevail."

69 Maryland Rep., 329; Brown *vs.* Smart.

Chancellor Kent, in commenting on a kindred subject, namely the law of contracts, remarks:

"But on this subject of conflicting laws, it may be generally observed that there is a stubborn principle of jurispru-

dence, that will often intervene and act with controlling efficacy. This principle is that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."

And this is the same rule as laid down by Huberus and Lord Ellenborough. (See Sec. 327, Story's Conflict of Laws.)

2 Kent's Commentaries [*461].

129 U. S. Rep., 365; Walworth *vs.* Harris.

141 U. S. Rep., 22; Pullman Car Co. *vs.* Penn.

93 U. S. Rep., 664; Harvey *vs.* R. I. Locomotive Works.

The Supreme Court of Pennsylvania, says that "every country has a right of regulating the transfer of all personal property within its territory; but, when *no positive regulation exists*, the owner transfers it at his pleasure."

Milne *vs.* Moreton, 6 Binney Pennsylvania Rep., 361.

Green *vs.* Van Buskirk, 5 Wallace Rep., 307.

Mr. Justice Miller in the decision in 5 Wallace, page 313, quotes with approval, from the opinion of the Louisiana court in a leading case on this subject, viz:

"If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. * * The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction she does so upon a principle of comity. In doing so care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity."

Walworth *vs.* Harris, 129 U. S. Rep., 364.

Justice Hunt announces the same doctrine in the case of Crapo *vs.* Kelly, reported in the 16th of Wallace's Reports, page 630, viz:

"Personal property which has an established *situs* in another State is no doubt governed by the *lex loci sitæ rei*, so far that it will be governed in its distribution by the laws of the place where found, rather than the law of the domicile.

"And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives."

Green *vs.* Van Buskirk, 7 Wallace Rep., 151.
Pullman Car Co. *vs.* Penn., 141 U. S. Rep., 22.
Walworth *vs.* Harris, 129 U. S. Rep., 365.

Like all other laws of a State the rule of comity is subject to legislative repeal, and when the territorial legislature of Idaho declared that it should not prevail in assigning property of an insolvent where preferences were made, it simply exercised an ordinary function of legislation. (92 U. S. Reps., 607, State Ry. tax cases.)

That the St. Paul Knitting Works Company was not a citizen of Idaho can make no difference in the application of the *lex fori* and also the *lex rei sitæ*.

The non-resident who becomes a suitor in the courts of Idaho is guaranteed by the Constitution of the United States the same privileges and immunities as citizens of Idaho. It is among the privileges secured to the citizens of each State by the Federal Constitution, Art. IV, Sec. 2, to institute and take the benefit of legal proceedings in the courts of any other State. Nor can the courts of Idaho deny to any person within their jurisdiction the equal protection of the laws (Art. XIV, Sec. 1, amendments to the Constitution).

The resident insolvent, under the law of Idaho, is not permitted to prefer any creditor in Idaho over any non-resident creditor, and it would be unjust to concede the contention of the assignee, that a non-resident insolvent, doing business in Idaho, can make an assignment, giving preferences to non-

residents over residents of the place where he carries on business and where his property is also situated.

There can be no distinction in administering the law, and no preference can be given or right denied to the citizen of one State over the citizen of another State or Territory of the United States.

Green *vs.* Van Buskirk, 7 Wallace Rep., 151.
Brown *vs.* Smart, 69 Maryland Rep., 327.
Hibernia Bank *vs.* Lacombe, 84 New York Rep., 385.
Paine *vs.* Lester, 44 Connecticut Rep., 197.
Ex parte Dickinson, 29 South Carolina Rep., 462.

The decision of this case by the Supreme Court of Idaho, (reported in volume 23, Pacific Reporter, 922) places a correct construction upon the local statute, and may safely be adopted and affirmed by this court.

WM. STONE ABERT,
JOHN W. WARNER,
Counsel for Patrick H. Kinney, Appellee.

JANUARY 2, 1893.